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## PURCHASE FOR VALUE WITHOUT NOTICE.

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IT seems to have been a common opinion in early times that a court of equity would give no assistance against a purchaser for value without notice.<sup>1</sup>

But, in *Phillips v. Phillips*<sup>2</sup> (1861), which at once became, and has since continued to be, the leading authority upon this subject, this doctrine, which Mr. Sugden strenuously defended to the last,<sup>3</sup> was definitively rejected. Lord Westbury, in his opinion, arranged the cases in which the plea of purchase for value would be a bar to equitable relief in three classes: (1) When an application is made to the auxiliary jurisdiction of the court. As illustrations under this class were mentioned bills for discovery and bills for the surrender of title-deeds belonging to the plaintiff. (2.) Where one who purchased an equitable interest in property, without notice of a prior equitable incumbrance of the plaintiff, has subsequently got in the outstanding legal title. This was the doctrine of *tabula in naufragio*. (3.) When a plaintiff seeks to charge a purchaser with "an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for

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<sup>1</sup> *Stanhope v. Verney*, 2 Eden, 81, 85, per Lord Henley; *Jerrard v. Saunders*, 2 Ves., Jr. 454, per Lord Loughborough; *Wallwyn v. Lee*, 9 Ves. 24, per Lord Eldon; *Payne v. Compton*, 2 Y. & C. Ex. 457, per Lord Abinger; *Attorney-General v. Wilkins*, 17 Beav. 285, per Sir John Romilly; *Gomm v. Parrott*, 3 C.B., n. s. 47.

<sup>2</sup> 4 D., F., & J. 208.

<sup>3</sup> *Sugden, V. & P.* (14 ed.) 791-798.

fraud, or to correct it for mistake." On the other hand, to a bill invoking the concurrent or exclusive jurisdiction of equity against a subsequent equitable incumbrancer, purchase for value without notice would be no defence.

It will be noticed that one common case of protection to a purchaser, namely, where one buys a legal title from a misconducting trustee without notice of the trust, does not come within any of Lord Westbury's three classes. Furthermore, the discrimination in his third class between an equity and an equitable estate is an unfortunate one, for two reasons. In the first place it is an attempted distinction between convertible terms. Every equity attaching to property is an equitable estate. The equity of a defrauded vendor is no less an equitable estate than the interest of *cestui que trust*. Indeed, the fraudulent vendee is constantly called a constructive trustee. Secondly, this distinction has led to a misconception as to Lord Westbury's real opinion. He has been thought to include in his third class all purchasers, even those who have not acquired from the fraudulent vendee the title of the defrauded vendor;<sup>1</sup> and yet it is quite clear that he would have protected those purchasers only who had completed their purchase.<sup>2</sup>

By far the most satisfactory discussion of this subject is contained in Mr. Langdell's "Summary of Equity Pleading." The conclusions of the learned author coincide in the main, save as to the doctrine of *tabula in naufragio*, with those of Lord Westbury. But he has explained, with great clearness, the *rationale* of the doctrine of purchase for value without notice. Mr. Langdell, however, it is hardly necessary to say, was dealing primarily with the subject of equity pleading. His examination of this doctrine as a part of the law of property was incidental and professedly incomplete. Any discrepancies, therefore, that may

<sup>1</sup> 2 White v. Tudor, L. C. Eq. (6 ed.) 23; Haynes, Defence of Purchase, Chap. III. See also Cave v. Cave, 15 Ch. D. 639, 647-9, per Fry, J.

<sup>2</sup> In Eyre v. Burmester, 10 H.L.C., 90, M made a legal mortgage to A, and then, suppressing A's mortgage, mortgaged the property to B. B having subsequently discovered A's mortgage, M, by fraudulent representations, induced A to reconvey to himself. No further conveyance was made to B. In a contest between A and B, A prevailed. Lord Westbury said, p. 104: "If B had advanced money to M on the faith of the release and M's actual possession of it, but without taking a conveyance, he might have had a lien on the deed itself; but, this interest being equitable only, would still, in my opinion, have been subject to the superior equity of A." This was said five months after the decision in Phillips v. Phillips.

seem to exist between his views and those of the present writer may be attributed, with possibly one or two exceptions, to an extension of the principles stated in the "Summary" rather than to any real divergence of opinion.

The principle as to purchase for value, which it is the object of these pages to justify, may be concisely stated as follows: A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. In all other cases the circumstance of innocent purchase is a fact of no legal significance.

The rule just given is simply an application of that comprehensive principle which lies at the foundation of constructive trusts and other equitable obligations created by operation of law (including implied or *quasi* contracts, which are really equitable liabilities, upon which the common law assumes to give a remedy), namely, that a court of equity will compel the surrender of an advantage by a defendant whenever, but only whenever, upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense. Indeed, it is not too much to say that the purchaser of a title from one who holds it subject to an equity is always charged, if chargeable at all, as a constructive trustee. If he acquired the title with notice of another's equity his acquisition was dishonest, and he must, of course, surrender it. If he gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest.<sup>1</sup> If he gave value, and had no notice of the equity, it is eminently just for him to keep what he has got.

It will be convenient to discuss, separately, the three classes of rights, before-mentioned, which a defendant may have acquired, namely: (1) legal rights of property, (2) equitable rights of property, and (3) other common-law rights, and then to consider

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<sup>1</sup> It is sometimes said that a volunteer has constructive notice of prior equities. But this is a perversion of the term notice. If a volunteer should, before actual notice of any equity, dispose of the title by gift, surely no claim could properly be made against him. Yet, if he had constructive notice, he would be liable for a wrong analogous to a breach of trust. If, again, a donee should sell the property, and subsequently buy it back, he could keep the property, though he would have to account for the proceeds of his sale; whereas, if he had constructive notice, he could not keep the property. Ames, *Cas. on Trusts*, 532.

the cases where the defendant derives no benefit from the circumstance that he is an innocent purchaser; and, finally, to examine the so-called doctrine of *tabula in naufragio*.

I. The typical case of protection of an innocent purchaser is the case where the defendant has bought a legal title from a fraudulent trustee or vendee.<sup>1</sup> No distinction is to be made between the purchaser of land and the purchaser of a chattel.<sup>2</sup> Nor is it essential that the innocent purchaser obtain the entire legal interest in the property, either in quantity or duration. The purchaser of an aliquot part of the estate, the grantee for value of a rent charge,<sup>3</sup> or the lessee for value, may keep the interest actually acquired from the fraudulent legal owner.

Closely akin to a lessee's right is the interest of a pledgee. His right is a legal right *in rem*, and fundamentally different from the lien of an equitable incumbrancer, which is a right *in personam*. The innocent pledgee of a chattel may, therefore, retain his pledge until the claim thereby secured is satisfied.<sup>4</sup> A pledge of title-deeds is as effectual as a pledge of any other chattel. Title-deeds are, it is true, so far an accessory of the title to the land as to pass with it to the grantee, although not mentioned in the deed of conveyance.<sup>5</sup> But they are not inseparably attached to the title. The owner of the land may sever them, if he will, and dispose of them as chattels.<sup>6</sup>

<sup>1</sup> *Pilcher v. Rawlins*, 7 Ch. 259; *Ames, Cas. on Trusts*, 531, n.

<sup>2</sup> *White v. Garden*, 10 C. B. 919; *Kingsford v. Merry*, 11 Ex. 577; *The Horlock*, 2 Pr. D. 243. The fact that a defrauded vendor of a chattel is allowed to maintain trover against the fraudulent vendee has given a certain currency to the opinion that the protection of an innocent purchaser of a chattel is due to the principle of equitable estoppel. See *Moyce v. Newington*, 4 Q.B. 32, 35, per Cockburn, C.J. *Lindsay v. Cundy*, 3 App. Cas., shows the fallacy of this opinion. In that case, B, fraudulently pretending that he was buying for M, induced A to consent to the sale to M, and to deliver the goods to himself. B then sold to C, an innocent purchaser. A prevailed against C, because the title had never passed from him. And yet there was as strong a basis for estoppel in this case as in those where the fraudulent vendee acquires a defeasible title. In truth, the fraudulent vendee who gets the title is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law.

<sup>3</sup> Y.B., 14 H. VIII. 4, pl. 5; *Cas. on Trusts*, 528, s. c.

<sup>4</sup> *Pease v. Gloahac*, L.R., 1 P.C. 219; *Babcock v. Lawson*, 4 Q.B.D. 394, 5 Q.B. Div. 284; *Joseph v. Lyons*, 15 Q.B. Div. 280; *Hallas v. Robinson*, 15 Q.B. Div. 288.

<sup>5</sup> *Copinger, Title-Deeds*, 2.

<sup>6</sup> *Copinger, Title-Deeds*, 4; *Barton v. Gainer*, 3 H. & N. 387, 388. See also the analogous cases of severance, by an obligee, of the document from the obligation. *Chadwick v. Sprite*, Cro. El. 821; *Mallory v. Lane*, Cro. Jac. 342; 2 Roll. Ab. 41 [G.2]; *Gibson v. Overbury*, 7 M. & W. 555; *Barton v. Gainer*, 3 H. & N. 387; *Rummens v. Hare*, 1 Ex. D. 169.

If, therefore, the owner of land, after creating an equitable incumbrance in favor of A, should subsequently give C an equitable mortgage by a deposit of the title-deeds, A could not compel the surrender of the deeds by C, if the latter had no notice of the prior incumbrance.<sup>1</sup> Nor has the Judicature Act affected the rights of such a pledgee.<sup>2</sup>

An honest purchaser will, furthermore, be protected, although he did not obtain the legal title at the time of his purchase, if he did acquire at that time an irrevocable power of obtaining the legal title upon the performance of some condition, and that, too, although, before performance of the condition, he received notice of the prior equitable claim. Thus, if a trustee, in violation of his duty, should sell the trust property to one who had no notice of the trust, and should deliver the deed in escrow, the defrauded *cestui que trust* could not restrain the innocent purchaser from performing the condition, nor could he obtain any relief against him after he had acquired the title.<sup>3</sup> On the same principle one who acquired at the time of his purchase an irrevocable power of obtaining the legal title upon the performance of some act by a third party, which that party is in duty bound to perform, will be as fully protected as if he had acquired the title itself at the time of his purchase. *Hume v. Dixon*<sup>4</sup> is a case in point. The owner of land subject to a vendor's lien sold it to an innocent purchaser; but, under the law of the State, the deed failed to convey the legal title, for the reason that the officer who took the acknowledgment of the deed forgot to sign his name thereto. He subsequently signed the deed, but after the grantee had notice of the lien. The purchaser was protected. Another illustration is furnished by *Dodds v. Hills*.<sup>5</sup> A trustee of shares in a company wrongfully pledged them, transferred the certificates, and executed a power to the innocent lender to register himself as owner of the shares. The transfer was registered after the lender was informed of the breach of trust.

<sup>1</sup> *Joyce v. De Moleyns*, 2 J. & Lat. 374; *Thorpe v. Holdsworth*, 7 Eq. 139. Sir John Romilly's decision in *Newton v. Newton*, 6 Eq. 135, is, therefore, not to be supported. See, further, S. C. on appeal, 4 Ch. 143; *Stackhouse v. Countess of Jersey*, 1 J. & H. 721.

<sup>2</sup> *Re Morgan*, 18 Ch. Div. 93.

<sup>3</sup> *Dodds v. Hills*, 2 H. & M. 424, 427, per Wood, V. C.

<sup>4</sup> 37 Oh. St. 66. See also *Buck v. Winn*, 11 B. Mon. 320, 323.

<sup>5</sup> 2 H. & M. 424.

Wood, V. C., refused to deprive the lender of his security. There are similar decisions in Scotland and in this country.<sup>1</sup>

If the reasons suggested for protecting the purchaser of shares in a company are sound they would seem to furnish a solution of the vexed question as to the rights of the innocent purchaser of a chose in action from one who held it subject to what are called latent equities, *i.e.*, equities in favor of any person other than the obligor; for no solid distinction can be drawn between a transferee of shares, with a power to register himself as owner, and an assignee for value of a chose in action. The so-called assignee is not properly an assignee, *i.e.*, successor, but an attorney with a power to collect or dispose of the claim for his own use. He corresponds to the Roman *procurator in rem suam*. Both in the Roman and the Teutonic systems of law a contract was conceived of as a strictly personal relation. It was as impossible for the obligee to substitute another in his place as it would have been for him to change any other term of the obligation. This conception, rather than the doctrine of maintenance, is the source of the rule that a chose in action is not assignable. In 1 Lilly's Ab., 103, it is said: "A statute merchant, or staple, or bond, etc., cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich., 22 Car. B.R."<sup>2</sup> It was a consequence of the assignor continuing the legal

<sup>1</sup> Redfearn v. Ferrier, 1 Dow. 50; Burns v. Lawrie's Trustees (Scotch). 2 D. 1348; Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 112; Winter v. Belmont, 53 Cal. 428; Atkinson v. Atkinson, 8 All. 15; McNeil v. Tenth Bank, 46 N. Y. 325. In Dodds v. Hills, it will be noticed, the lender was able to complete his title under the power without further assistance from the delinquent trustee. If the lender required the performance of some further act on the part of the trustee in order to complete his title, and if before such performance he received notice of the trust, the loss would fall upon him; for in the case supposed he could not obtain the title without making himself a party to the continuance of the breach of trust. Ortigosa v. Brown (47 L.J. Ch. 168) was decided in favor of a defrauded pledgor upon this distinction.

<sup>2</sup> See 2 Spence, Eq. Jur. 850; Pollock, Contracts, 206; 2 Bl. Com. 442. The wrong of maintenance lay in executing and exercising the power of attorney. The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance, while a similar grant to a purchaser or donee was maintenance. 34 H. VI. 30-15; 37 H. VI. 13-3; 15 H. VII. 2-3; South v. Marsh (1590), 3 Leon. 234; Harvey v. Beekman (1600), Noy, 52. As late as 1667-1672 the same distinction prevailed also in equity "The Lord Keeper Bridgman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignor owes nothing precedent, so that the assignment is voluntary or for money then given." Freem. C.C. 145.

owner of the obligation that he had the ability, though not the right, to destroy the assignee's right under the power of attorney; he had only to execute a release of the obligation, which would, of course, be a bar to any subsequent action by the assignee, in the assignor's name, against the obligor, even though the latter were a party to the wrong. Such a destruction of the assignee's right would be a tort, and a court of equity would, at the instance of the assignee, either restrain its commission or compel the assignor to surrender to the assignee whatever he had collected of the obligor. This is the real significance of the statements, sometimes made, that a power, though revocable at law, is irrevocable in equity, and that a chose in action is assignable in equity, although not assignable at law. In the absence of any actual or threatened tort the assignee of a chose in action was entitled to no relief in equity;<sup>1</sup> and for the simple reason that he could, by virtue of his power of attorney, enforce payment of his claim at common law. It seems clear, therefore, that, even though the assignor committed a breach of trust in granting to the assignee this power of reducing the chose in action to possession, a court of equity ought not to deprive him of it, if acquired by honest purchase. If this principle is sound in the case of an assignee whose power is only to sue in the name of the assignor, it applies *a fortiori* in favor of an assignee, who, by statute, is permitted to sue in his own name. The authorities are, however, hopelessly irreconcilable. In England the assignee finds no protection, whether the assignor was an express trustee<sup>2</sup> or a constructive trustee, *e.g.*, a fraudulent assignee.<sup>3</sup> In this country, on the other hand, as also in Scotland,<sup>4</sup> the assignee is, as a rule, protected from all latent equities<sup>5</sup> (except, of course, those in favor of the obligor). The English rule that the assignee takes subject to latent equities is followed in New York;<sup>6</sup> but a qualification is made in favor of an assignee whose assignor is himself an

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<sup>1</sup> *Cator v. Burke*, 1 Bro. C. C. 434; *Hammond v. Messenger*, 9 Sim. 327; *Hayward v. Anderson*, 106 U. S. 672; *Walker v. Brooks*, 125 Mass. 241.

<sup>2</sup> *Moore v. Jervis*, 2 Coll. 60; *Brandon v. Brandon*, 7 D., M., & G. 365; *Cory v. Eyre*, 1 D., J., & S. 149; *Re European Bank*, 5 Ch. 358.

<sup>3</sup> *Cockell v. Taylor*, 15 Beav. 103; *Barnard v. Hunter*, 2 Jur. n. s. 1213.

<sup>4</sup> *Bell, Principles of Law* (6 ed.), 637.

<sup>5</sup> *Cas. on Trusts*, 552-553.

<sup>6</sup> *Schafer v. Reilly*, 50 N.Y. 61; *Trustees v. Wheeler*, 61 N.Y. 88, and other cases cited in *Cas. on Trusts*, 552, n.

assignee under a written assignment procured by fraud.<sup>1</sup> This qualification is supposed to be an illustration of the principle of equitable estoppel. But an estoppel implies a variance between the real and the apparent fact. If, however, an assignment is a power of collection and substitution, it follows that in the case of a fraudulent assignment this essential feature of an estoppel is wanting. There is an identity between the real and the apparent fact. The fraudulent assignee not only purports to have, but actually has, the power of collection and substitution. He is in duty bound, it is true, not to exercise the power to the prejudice of his assignor; but his duty is the same as that which fastens upon the conscience of a fraudulent vendee of land not to convey the land to the detriment of the vendor. The decision in *Moore v. Metropolitan Bank*,<sup>2</sup> is therefore repugnant to the English rule which the courts in New York profess to follow.

In all the cases hitherto considered, the legal title, or other legal right of property, it has been assumed, was acquired at the time of the purchase. But he who advances money on the faith of a legal title that he already has, is equally entitled to protection. Thus, a first mortgagee, who makes subsequent advances in ignorance of a second mortgage, has priority as to those advances over the second mortgagee.<sup>3</sup> He is in the same position as if he had surrendered his first mortgage and taken a fresh conveyance of the legal estate to secure the whole of his advance. *Newman v. Newman*<sup>4</sup> illustrates the same principle. A *cestui que trust*, who had mortgaged his equity, released his interest to the trustee, who gave value without notice of the mortgage. The trustee, it was decided, could not be charged with the mortgage.

II. It is commonly said that, as between adverse equitable claimants, he who is prior in time is stronger in law, unless by his representation or conduct he has misled the later incumbrancer. But the rule, so stated, requires, at least in point of principle, an

<sup>1</sup> *Moore v. Metropolitan Bank*, 55 N.Y. 41. In *Barry v. Equitable Society*, 59 N.Y. 587, an assignment procured by duress was distinguished, without sufficient reason, from one obtained by fraud.

<sup>2</sup> 55 N.Y. 41.

<sup>3</sup> *Collet v. De Gols, Talbot*, 65; *Barnett v. Weston*, 12 Ves. 130; *Hopkinson v. Rolt*, 9 H. L. C. 514 (*semble*); *Truscott v. King*, 2 Seld. 166; *Cas. on Trusts*, 542. The "tacking" in these cases is wholly distinct from that unjust tacking whereby a third mortgagee is permitted to buy up the first mortgage, and "squeeze out" the second.

<sup>4</sup> 28 Ch. D. 674.



important qualification, namely, that the equities of the adverse claimant must be immediate equities against the same person. There are many illustrations of the rule thus modified. For example, B, an express trustee for A, sells, without conveying the legal title, to C, who pays the purchase money without notice of the trust.<sup>1</sup> Or B makes an equitable mortgage to C.<sup>2</sup> Again, B, a fraudulent vendee, *i.e.*, a constructive trustee, of A, sells, without conveying the legal title, to C,<sup>3</sup> or gives him an equitable mortgage, or declares himself a trustee for him. In all these cases A and C have each an immediate equity against B. In all of them C must be postponed, because, in fact, no interest in the land passed to him by B's conveyances. B could not convey A's equitable interest as such, although he might have destroyed it by conveying the legal title, and he did not, as he might have done, convey his own legal interest.

But the rule as to conflicting equities, it is conceived, may be expressed more comprehensively. Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity. In all other cases the rule of priority governs, unless modified by the principle of estoppel. As the proposition here advanced has the merit, or, perhaps it should rather be said, the demerit, of novelty, it will be necessary to examine the true nature of an equitable right of property.

A *cestui que trust* is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical *res*. The most striking difference between property in a thing and property in an obligation is in the mode of enjoyment. The owner of a house or a horse enjoys the fruits of ownership without the aid of any other person. The only

<sup>1</sup> *Pinkett v. Wright*, 2 Hare, 120; *Att'y-Gen. v. Flint*, 4 Hare, 147; *Baillie v. M'Kewan*, 35 Beav. 177; *Wigg v. Wigg*, 1 Atk. 384. See also *Cas. on Trusts*, 532-3.

<sup>2</sup> *Shropshire Co. v. Queen L. R.*, 7 H. L. 496; *Cas. on Trusts*, 551, n. 1.

<sup>3</sup> *Eyre v. Burmester*, 10 H. L. C. 90, 103, per Lord Westbury; *Peabody v. Fenton*, 3 Barb. Ch. 451, 464-5, per Walworth, C. See also the analogous cases of bills of exchange, *Cas. on Trusts*, 533.

way in which the owner of an obligation can realize his ownership is by compelling its performance by the obligor. Hence, in the one case, the owner is said to have a right *in rem*, and, in the other, a right *in personam*. In other respects the common rules of property apply equally to ownership of things and ownership of obligations. For example, what may be called the passive rights of ownership are the same in both cases. The general duty resting upon all mankind not to destroy the property of another, is as cogent in favor of an obligee as it is in favor of the owner of a horse. And the violation of this duty is as pure a tort in the one case as in the other.<sup>1</sup>

The law of transfer is also the same for both forms of property. Take, for instance, the case of land. The owner may diminish his interest (1) by a transfer of the whole or an aliquot part of the land either permanently or for a time; (2) he may grant a rent charge issuing out of the land; or (3) he may charge himself with a trust or other equity in regard to the land. If, after diminishing his interest in either of the first two modes mentioned, he should make an ostensible conveyance of the whole land to an innocent purchaser, the latter would take only the diminished interest of his grantor; whereas, if he should make a similar conveyance after reducing his interest, in the third mode, the purchaser would take the legal title unincumbered. No reason occurs to the writer why a *cestui que trust* of land may not deal with his interest in the obligation of the trustee in a similar way, and with similar consequences. He certainly may transfer the whole or an aliquot part<sup>2</sup> of the obligation, and he may grant a rent charge issuing out of it<sup>3</sup> and he may also charge himself as trustee, or subject himself to any other equity in regard to the obligation. It is also true, that if the *cestui que trust*, after diminishing his interest by an assignment, should make an ostensible conveyance of his trust to an innocent purchaser, the latter would take subject to the previous

<sup>1</sup> From the nature of the case such a tort must be of rare occurrence. But instances may be put. B, a *cestui que trust*, assigns his trust to A, and afterwards, before the trustee is informed of the assignment, releases the trust to the trustee, as in *Newman v. Newman*, 28 Ch. D. 674. A's right against the trustee is destroyed. Again, suppose that C, a stranger, had maliciously incited B to make the release. A's claim against B and C would be for compensation for a purely equitable tort. Compare *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. Div. 333.

<sup>2</sup> *Tierney v. Wood*, 19 Beav. 330; *Cas. on Trusts*, 189. The obligation of a trustee is, from its nature, divisible, differing in this respect from most obligations.

<sup>3</sup> *Phillips v. Phillips*, 4 D., F., & J. 208; *Cas. on Trusts*, 433.

assignment.<sup>1</sup> Such a purchaser would also take subject to the annuity or rent charge.<sup>2</sup> Finally, if the *cestui que trust* should convey his trust after charging himself with a sub-trust, or other equity, the innocent purchaser ought to take the trust discharged from the sub-trust, or other equity, as in the corresponding case the purchaser acquires an absolute title to the land. The analogy between the two cases would seem to be perfect. The *cestui que trust* of the equitable obligation stands in the same relation to the owner of that obligation which the *cestui que trust* of the land occupies towards the owner of the land. Each has an immediate claim against his trustee; neither has a direct claim upon the subject-matter of the trust. Just as the *cestui que trust* of the land must work out his rights through the owner of the land, so the *cestui que trust* of the equitable obligation must work out his rights through the owner of the obligation. As the trustee of the land is complete owner of the land, subject to a duty in favor of the *cestui que trust* of the land, so the trustee of the equitable obligation is complete owner of the obligation, subject to a duty in favor of the *cestui que trust* of the obligation. The conclusion seems unavoidable, therefore, that as the ownership of the land may be transferred discharged of the duty in the one case, so the ownership of the equitable obligation may be transferred discharged of the duty in the other case. What is true of a sub-trust, or equity, created by the will of the owner of the equitable obligation must, obviously, be equally true of a sub-trust, or equity, created by operation of law. For example, if the owner of the equitable obligation were induced by fraud or duress to convey the obligation the fraudulent vendee would become the owner of it; but the law would raise a duty in him to deal with it for the benefit of the defrauded vendor, in other words, would make him a constructive trustee of the obligation in favor of the vendor; but if he should convey the obligation to a purchaser for value, without notice of the constructive trust, the purchaser could not properly be charged with it.

None of the decisions, it must be conceded, have proceeded upon

<sup>1</sup> Lee v. Howlett, 2 K. & J. 531; Cas. on Trusts, 428, 432, n. 1. An exception is made in the case of the transfer of equitable interests in personalty in England, and in a few States in this country, where the peculiar rule of Dearle v. Hall, 3 Russ. 48, obtains. But this decision, which was virtually a judicial creation of a registry law, has not met with much favor in this country. Putnam v. Story, 132 Mass. 205; Williams v. Ingersoll, 89 N. Y. 508, 523; Cas. on Trusts, 429.

<sup>2</sup> Phillips v. Phillips, 4 D., F., & J. 208; Cas. on Trusts, 433.

the principle herein advanced. Several of them, however, must be supported upon this principle, or else be pronounced erroneous. In *Sturge v. Starr*,<sup>1</sup> A, a *cestui que trust*, was induced by the fraud of B to sell her trust to C, a purchaser for value, without notice of the fraud. C was protected in his purchase. In *Lane v. Jackson*,<sup>2</sup> B, the owner of an equity of redemption, subject to an equity in favor of A, sold the equity of redemption to C, an innocent purchaser. A was not permitted to enforce his equity against C. *Penny v. Watts*<sup>3</sup> was a similar case, with a similar decision. To overrule these cases would be a misfortune.

On the other hand, in *Re Vernon*,<sup>4</sup> B, who held an equity of redemption in trust for A, sold it to C. The decision was in A's favor, on the ground of priority in time. In the court below, however, Bacon, V.C., found that C had notice of the trust, and the Court of Appeal disclaimed any dissent from this finding. In *Cave v. Mackenzie*,<sup>5</sup> an agent, acting for an undisclosed principal, contracted in his own name for the purchase of an estate, and then sold his right to call for a conveyance. The purchaser was deprived of the benefit of his purchase. In *Daubeny v. Cockburn*,<sup>6</sup> B, having a power to appoint a trust-fund to any of his children, which fund, in default of appointment, was to go to A, appointed the fund fraudulently to his daughter, M, in order to secure a personal advantage. M transferred the fund to C, an innocent purchaser. C was not permitted to keep the fund. Decisions like these, it is submitted, are powerful arguments against the doctrine of which they are a necessary consequence.

III. There were formerly two classes of cases in which a purchaser who had not acquired a right of property, either legal or equitable, was, nevertheless, allowed to plead purchase for value as a bar to the jurisdiction of a court of equity, on the ground that the plaintiff was seeking to deprive him of a common-law right, acquired as an incident of his purchase. One of these rights was the right of a defendant to refuse to testify in a court of common law. Bills for discovery against a purchaser for value were invariably dismissed, equity declining to strip the defendant of his common-law advantage.<sup>7</sup> A defendant had no right, on the

<sup>1</sup> 2 M. & K. 195.

<sup>2</sup> 20 Beav. 535.

<sup>3</sup> 2 DeG. & Sm. 501.

<sup>7</sup> *Bassett v. Nosworthy*, Finch, 102; *Hoare v. Parker*, 1 Bro. C. C. 578; *Gomm v. Parrott*, 3 C. B. n. s., 47.

<sup>4</sup> 33 Ch. Div. 402; 32 Ch. D. 165.

<sup>5</sup> 46 L. J. Ch.

<sup>6</sup> 1 Mer. 626.

other hand, to refuse to give evidence to be used in a court of equity. Accordingly, if a defendant failed to demur or plead to a bill for relief, but answered, he was bound to answer fully, although he were a purchaser for value without notice.<sup>1</sup>

The other right, of which a purchaser for value without notice could not be deprived, was the right to set up an outstanding satisfied term as a bar to an action of ejectment. It was not inequitable for him to insist upon an advantage which the policy of the law gave him, and accordingly purchase for value was a sufficient ground for dismissing a bill to restrain the defendant from setting up the term.<sup>2</sup> Both of these rights were accidental, and, with the change of the policy of the law, have ceased to exist, a defendant having been obliged to testify at law since 1851, and satisfied terms having been virtually abolished by the Satisfied Terms Act.

IV. Except in the cases mentioned in the preceding three sections a defendant can derive no advantage from the circumstance that he is a purchaser for value without notice. This will appear by an enumeration of the different classes of bills which have been sustained against such a purchaser. Bills of foreclosure, whether by a legal<sup>3</sup> or equitable<sup>4</sup> mortgagee; bills for partition;<sup>5</sup> for an account of tithes;<sup>6</sup> for the assignment of dower;<sup>7</sup> for the surrender of possession of chattels;<sup>8</sup> to have a paid judgment satisfied of record;<sup>9</sup> for the removal of a cloud upon a title;<sup>10</sup> for the cancellation of a void instrument;<sup>11</sup> for the perpetuation of testimony.<sup>12</sup> In none of the cases just mentioned was a court of

<sup>1</sup> *Lancaster v. Evors*, 1 Phillips, 349, 352; *Emmerson v. Ind.*, 33 Ch. Div. 323, 331; *Langdell, Eq. Pl.* (2 ed.), § 194.

<sup>2</sup> *Goleborn v. Alcock*, 2 Sim. 552; *Langdell, Eq. Pl.* (2 ed.), § 189. Mr. Langdell makes it clear that a bill to restrain the setting up of an outstanding term is not a bill belonging to the auxiliary jurisdiction. But, if the general principle of this essay is sound, the success of the defendant does not depend upon the nature of the jurisdiction invoked, but upon the possession of a right which the plaintiff seeks to take from him.

<sup>3</sup> *Finch v. Shaw*, 5 H. L. C. 905.      <sup>4</sup> *Frazer v. Jones*, 5 Hare, 475, 172 J. Ch. 353.

<sup>5</sup> *Snellgrove v. Snellgrove*, 4 Dess. 274; *Donald v. McCord*, Rice Eq. 330. But see *contra*, *Lyne v. Lyne*, 21 Beav. 318.

<sup>6</sup> *Collins v. Archer*, 1 Russ & My. 284.      <sup>7</sup> *Williams v. Lambe*, 3 Bro. C. C. 264.

<sup>8</sup> *Jones v. Zollicoffer*, 2 Tayl. 212; *Brown v. Wood*, 6 Rich. Eq. 155.

<sup>9</sup> *Traphagen v. Lyon*, 38 N. J. Eq. 613.      <sup>10</sup> *U.S. v. Southern Co.*, 18 Fed. Rep. 273; *Gray v. Jones*, 14 Fed. Rep. 83.

<sup>11</sup> *Esdaile v. Lanauze*, 1 Y. & C. Ex. 394; *Vorley v. Cooke*, 1 Giff. 230; *Peabody v. Fenton*, 3 Barb. Ch. 451 (*semble*).

<sup>12</sup> *Dursley v. Berkeley*, 6 Ves. 251, 263-4, *semble* per Lord Eldon. But see *contra*, *Jerrard v. Saunders*, 2 Ves., Jr. 454, 458, per Lord Loughborough.

equity called upon to deprive the defendant of any right of property. In all of them the right of property was in the plaintiff, who asked only for that assistance which equity regularly gives to owners of property.

In *Attorney-General v. Wilkins*<sup>1</sup> a plea of purchase for value was allowed to defeat a bill for the recovery of a rent. But this case would, doubtless, not be followed. An exception existed in the case of a bill by the legal owner of an estate for the surrender of the title-deeds. *Wallwyn v. Lee*.<sup>2</sup> This case was decided under the influence of the old view that equity would give no assistance against an innocent purchaser. And it would certainly have been a case of great hardship to the defendant if the decision had been adverse to him. For, it is highly probable, the plaintiff resorted to equity from inability to prove his title at law, and if he had succeeded he would, by an indirection, have got the evidence which he could not have obtained by a bill for discovery. The refusal of the court in several cases<sup>3</sup> to compel the surrender of title-deeds in foreclosure suits brought by a legal mortgagee after the plaintiff had proved his title is cause for surprise. But these cases have now lost their force, since, under the Judicature Act, the plaintiff gets in the foreclosure suit what formerly he would obtain only by a separate action at law.<sup>4</sup>

V. In cases where the rule of priority in time would otherwise determine the rights of adverse equitable claimants, it sometimes happens that the later incumbrancer subsequently acquires the outstanding legal title. Under what circumstance can he profit by the title so obtained? By the old law, if he gave value for his equity without notice of the prior equity, he was permitted to use the subsequently acquired title as *tabula in naufragio* under all circumstances, even though he gave nothing for the legal title, or obtained it with notice of the prior equity. This was an extreme application of the old rule, that equity would not exercise its jurisdiction against an honest purchaser. It was, however, long since decided that a later incumbrancer could derive no advantage from

<sup>1</sup> 17 Beav. 285.

<sup>2</sup> 9 Ves. 24.

<sup>3</sup> *Head v. Egerton*, 3 P. Wms. 280; *Kendall v. Hulls*, 11 Jur. 864; *Hunt v. Elmes*, 2 D., F., & J. 578; *Heath v. Crealock*, 10 Ch. 22; *Waldy v. Gray*, 20 Eq. 238.

<sup>4</sup> *Cooper v. Vesey*, 20 Ch. Div. 611; *Manners v. Mew*, 29 Ch. D. 725.

an outstanding satisfied term got in with notice of the prior equity.<sup>1</sup> No case has been found where such a term was got in without notice of the prior equity. Sir George Jessel, M. R., put the case, however, in *Mumford v. Stohwasser*,<sup>2</sup> and expressed a strong opinion that the later equitable claimant could not use the term as *tabula in naufragio*, because, having acquired it as a volunteer, he could not honestly retain it.

The common illustration of the ancient rule is the English doctrine of tacking, whereby a third mortgagee, who advanced his money in ignorance of a second mortgage, is permitted upon discovering its existence to buy up the first mortgage, to tack his own to it, and so "squeeze out" the second.<sup>3</sup> This doctrine has found no support in this country,<sup>4</sup> and has been the subject of much adverse criticism in England.<sup>5</sup> Even if a third mortgagee should buy up the first mortgage, being still in ignorance of the second, he would not, upon principle, be entitled to priority over the second mortgagee. For, as he gave his money solely for the first mortgage, if he should be allowed to get anything more than that, he would get it for nothing, and could not, therefore, honestly keep it at the expense of the second mortgagee.<sup>6</sup>

It is possible, however, for a later equitable claimant, who has already paid his money, to obtain the legal title afterwards for

<sup>1</sup> *Allen v. Knight*, 5 Hare, 272, 11 Jur. 257; *Carter v. Carter*, 3 K. & J. 717; *Prosser v. Rice*, 28 Beav. 68, 74; *Sharples v. Adams*, 32 Beav. 213, 216; *Baillie v. McKewan*, 35 Beav. 177; *Pilcher v. Rawlins*, 7 Ch. 259, 268; *Mumford v. Stohwasser*, 18 Eq. 556; *Cas. on Trusts*, 534, n. 2.

<sup>2</sup> 18 Eq. 562. The same idea is expressed by the same Judge in *Maxfield v. Burton*, 17 Eq. 15, 19, and by North, J., in *Garnham v. Skipper*, 55 L. J. Ch. 263, 264.

<sup>3</sup> *Marsh v. Lee*, 1 Ch. Ca. 162; *Bates v. Johnson*, Johns. 304; *Cas. on Trusts*, 537, 541, n. 1.

<sup>4</sup> 1 Story, Eq. Jur. (12 ed.), §§ 413-419; 4 Kent (13 ed.), 177-179; *Cas. on Trusts*, 542.

<sup>5</sup> *Bruce v. Duchess of Marlborough*, 2 P. Wms. 491; *Jennings v. Jordan*, 6 App. Cas. 698, 714; *West London Bank v. Reliance Society*, 29 Ch. Div. 954, 961, 963. Under certain circumstances one who advances money upon the security of property, upon which two mortgages have already been given, is justly entitled to outrank the second mortgagee. For example, M has made a first mortgage for \$5,000 to A, and a second mortgage for \$5,000 to B. A desiring his money, M proposes to C that he shall advance \$10,000, paying \$5,000 to A, and taking a conveyance from him, and paying the other \$5,000 to M. If C makes the advance of \$10,000 in the manner suggested, and has no notice of B's mortgage, he may fairly claim priority over B. *Peacock v. Burt*, 4 L. J. Ch., n. s., 33, was such a case. This is not a case of tacking, nor of *tabula in naufragio*. The transaction is the same in substance as if A had reconveyed to M, and M had then made a legal mortgage for \$10,000 to C. *Carlisle Co. v. Thompson*, 28 Ch. D. 398, was similar to *Peacock v. Burt*, except that C was not a mortgagee, but a purchaser.

<sup>6</sup> [See 4 HARV. LAW REV. 309, n. 3.]

value; and if he so obtains it, being still ignorant of the prior equity, he is as much entitled to protection as any other purchaser of a legal title. For example, if a trustee should, in violation of his trust, contract to sell the land to A, receiving the purchase money at the time, or should make an equitable mortgage by deposit of the title-deeds, and should afterwards, in discharge of his obligation, convey the legal title to A, the latter could not be charged with the prior equity;<sup>1</sup> for one who takes a legal title in discharge of a claim against the transferrer is a purchaser for value.<sup>2</sup> It follows, therefore, that these cases do not come within the doctrine of *tabula in naufragio*, and it may be fairly said that that doctrine survives only in the unjust and much-criticised English rule of tacking.

In conclusion, the results of the preceding pages may be summed up as follows: The purchaser of any right, in its nature transmissible, whether a right *in rem* or a right *in personam*, acquires the right free from all equities of which he had no notice at the time of its acquisition. This proposition, it is hoped, will find favor with the reader in point of legal principle. It can hardly fail to commend itself on the score of justice and mercantile convenience.

J. B. Ames.

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<sup>1</sup> Ratcliffe v. Barnard, 6 Ch. 652; Cooke v. Wilton, 29 Beav. 100; Leask v. Scott, 2 Q. B. Div. 376; Gibson v. Lenhart, 101 Pa. 522. But see *contra*, Barnard v. Campbell, 55 N. Y. 466, 58 N. Y. 73. But by the law of New York one who takes a title in payment of a debt is not considered to be a purchaser for value. Dickerson v. Tillinghast, 4 Paige, 215; Stevenson v. Brennan, 79 N. Y. 254.

<sup>2</sup> Taylor v. Blacklock, 32 Ch. D. 560; Merchants' Co. v. Abbott, 131 Mass. 397.



## TICKETS.

THE use of tickets by railroad companies has in the last thirty years given great and increasing legal significance to that species of document. Yet, in spite of the many cases in which questions arising from the use of tickets have been discussed, no attempt has been made to determine the exact legal status of a ticket; and much confusion has resulted from a failure to distinguish instruments properly called tickets from mere receipts or vouchers. Before discussing at large the points at issue it will be necessary to propose an accurate definition of a ticket.

A ticket is a formal document, valid and interpretable by some well-known business custom, requiring the party issuing it to do something, or to give something, not money, to the bearer at or within a certain time. It secures a future right to the bearer; thus differing from a receipt or voucher, which merely proves a right already secured.

The tickets in general use fall into four classes. By far the most important class consists of tickets which entitle the bearer to the service of the maker as carrier. Of this class two sorts of tickets are used: railroad tickets and postage-stamps. A class of tickets very similar to these consists of tickets admitting the bearer to some place of amusement, there to be entertained; the typical ticket of this sort is a theatre ticket. A third class consists of tickets entitling the bearer to a chance in a lottery. Finally, there is a class of tickets, of slight pecuniary value, entitling the bearer to food or drink: dinner tickets, soup tickets, soda tickets, and the like.

These tickets differ, of course, in detail; but they all agree in essentials, and, principally, they are all contracts. This has always been recognized in the case of lottery tickets<sup>1</sup> and theatre tickets.<sup>2</sup> In the case of railroad tickets, however, there has been some difference of opinion.

The whole difficulty arose from two important cases, decided in New York thirty years ago by the Court of Appeals, in which

<sup>1</sup> *Homer v. Whitman*, 15 Mass. 132; *McLaughlin v. Waite*, 5 Wend. 404; *Shankland v. Corporation of Washington*, 5 Pet. 390.

<sup>2</sup> *McCrae v. Marsh*, 12 Gray, 211; *Burton v. Scherpf*, 1 All. 133.

the nature of a railroad ticket was carefully debated. The first of these cases was *Hibbard v. R. R. Co.*<sup>1</sup> Hibbard took passage on the cars of the defendant company, having a ticket which, on demand, he showed to the conductor. The conductor afterwards asked again to see the ticket, but Hibbard refused to show it. He, however, assured the conductor that he had a ticket ; so did several other passengers who had seen the ticket. It did not appear that the conductor himself did not remember that Hibbard had already showed his ticket ; but Hibbard persisted in his refusal, and the conductor ejected him from the train.

The question before the court, therefore, was merely whether the rule of the company, requiring passengers to show their tickets whenever requested, was a reasonable one. But the court considered the nature of the ticket, and the general opinion seemed to be expressed by Denio, C. J., who said that a ticket was "a receipt for the payment of fare." Brown, J., went further. "The ticket," he said, "is the property of the railroad company, and is a part of the means by which it conducts its business: It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: it is evidence in the passenger's hands that he has paid his fare and has a right within the cars ; it insures the payment of the passage money by all who take seats, and when it is redelivered to the company it becomes a voucher in its hands, against the office or agent who issued it, in the adjustment of its accounts."

This is a singularly inaccurate description of a railroad ticket ; which, whatever else it may be, is certainly the property of the holder, and not of the railroad company. But it is an almost exact description of a cancelled ticket which is left in the possession of the passenger to serve the purpose of a conductor's check. That, certainly, is not a contract, but a receipt ; and that was in fact the character of the instrument in question in this case. The opinion of Brown, J., is a striking example of judicial intuition ; for the distinction noticed above is hardly yet recognized in the law.

Soon after this decision the same court had again to consider the same question in a case which at once became the leading one on the subject, — *Quimby v. Vanderbilt*.<sup>2</sup> Vanderbilt advertised to

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<sup>1</sup> 15 N. Y. 455.

<sup>2</sup> 17 N. Y. 306.

transport passengers to California from New York over two lines of steamship, with a connecting transit across the Isthmus. The road across the Isthmus was in fact operated by an independent company. This company gave Vanderbilt its tickets, which he sold, as he had occasion, in connection with tickets of the steamship company; and for each ticket sold he paid the Transit Company a certain sum of money. It was clear that he did not act as agent for that company. The plaintiff in this case bought a ticket, relying on Vanderbilt's advertisement and representations at the time he sold the ticket; and when he reached the Isthmus no means of transportation were furnished for him. He sued Vanderbilt for failing to transport him. The defendant relied on certain expressions thrown out in earlier cases,<sup>1</sup> that a ticket was *evidence* of a contract, and could not, therefore, be varied. He, therefore, claimed that, as the ticket purported to be issued by the Transit Company, it was impossible to show by parol evidence that Vanderbilt actually made the contract.

Now, it is perfectly plain that in this case there was a contract of carriage, apart from the ticket. The plaintiff made a bargain with the agent of Vanderbilt — not a ticket-agent merely, but one authorized to make such contracts — for a journey of which the transit across the Isthmus formed a part. It was evident that the court should hold Vanderbilt liable, and so they did. They adopted the theory that Chief Justice Denio had put forward in *Hibbard v. R. R. Co.*, that a ticket is a receipt for the payment of fare. In both cases, it will be noticed, the theory is more plausible than in the ordinary case. Denio's argument in support of the theory seems, it must be confessed, rather inconclusive.

"Their character as mere tokens is shown by the fact that the defendant received them in large numbers of the Transit Company, not as an agent of that company for the purpose of making bargains in its behalf with others, but to furnish them to persons with whom he expected to deal on his own account. . . . To him [the company] sold tickets in the nature of permits for passage over their route, in such quantities as he chose to purchase. It is proved that neither he nor Allen were agents for the Transit Company. When he dealt with a traveler, therefore, he bargained on his own account, and not on behalf of the Transit Company." The object of this whole argument is to prove that the ticket was not

<sup>1</sup> See, for instance, the language of Ellsworth, J., in *Hood v. R. R. Co.*, 22 Conn. 1.

evidence of the special contract between the defendant and the plaintiff, and in this respect the opinion is convincing ; but in the constructive part of the argument the reasoning is not perfectly clear.

The name of Denio was enough to give this theory an importance and a currency beyond its merits. It is hardly held, now, as a working theory in any jurisdiction ; but phrases are often thrown out, in passing, by the judges which show that the theory at some time approved itself to their minds. Thus Agnew, J., said, in *Dietrich v. R. R. Co.*,<sup>1</sup> " Tickets are evidence of the payment of the fare, and of the right of the holder, or party named, as here, to be carried according to its terms." Lord Chelmsford, in *Henderson v. Stevenson*, said<sup>2</sup> " The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid." This is the most logical statement of the doctrine under consideration that has ever been made ; yet the noble and learned lord was so little satisfied with it that he went on in his next words to outline an alternative theory.

This theory is objectionable for many reasons. Payment of the money to the ticket-agent does not, unless the payer secures a ticket, give the right to ride.<sup>3</sup> Nor has a ticket-holder in very many cases paid his fare ; for instance, where a free pass is issued on some consideration, which is not the payment of fare, or where the purchaser of the ticket has sold or given it to the passenger. But the principal objection to the theory is this : it is impossible to pay for anything before one gets it. " Payment in advance," so called, is really a payment which is the consideration of a promise to perform ; otherwise the payment would be without consideration, and, not being meant as a gift, might be recovered. The payment of fare on the train is payment made concurrently with performance on the other side. There is no contract on either side. So in case of the payment of the price of admission to a theatre ; it is made at the time of admission, and is not to secure a contract. If the actress is ill, and cannot appear, the one who has paid the price of admission is entitled to have it refunded, because his considera-

<sup>1</sup> 71 Pa. St. 432, 435.

<sup>2</sup> L. R., 2 H. L. Sc. 470, 477.

<sup>3</sup> *Weaver v. R. R. Co.*, 3 N. Y. S. Ct. 270; and see *Frederick v. R. R. Co.*, 37 Mich. 342.

tion has failed. One, however, who had bought a ticket days beforehand, who had gone to great expense on account of the performance in the way of carriage-hire, who had suffered great disappointment through the postponement, might doubtless recover against the maker of the ticket in an action of contract, in which his damages might well exceed the price he had paid for his ticket.<sup>1</sup> In the same way one who has bought a ticket before taking the train would, from the time he purchased the ticket until he presented it in the train, have a claim against the company. It is this claim for which the purchaser paid money; and this claim is the ticket.

This objection was avoided by the courts, which passed gradually and insensibly from Chief Justice Denio's theory to the true one. Thus, Wheeler, J., said in *Jerome v. Smith*,<sup>2</sup> "When the plaintiff bought the ticket . . . he bought what was symbolic evidence of a right that whoever should have it might ride, and what any other person could use as well as he. The title to it, and right to a passage upon it, would pass by mere delivery, and whoever should have it could pay the fare of a passenger with it by delivering it in payment." The court abandoned the notion that the fare was paid when the ticket was purchased; but no intimation was given as to the nature of the ticket before it was presented in the train. It is clear, however, that the right it gives the bearer to ride is an irrevocable, that is, a contractual right. If this were not so the company might at any time abandon the use of tickets, or increase the price of them, and refuse to receive the tickets previously issued; yet this plainly could not be done by the custom of railroads.

It became inevitable, therefore, that a contract should be recognized as existing before the ticket was presented in payment; and the courts have gradually reached the true theory. In the leading case in Ohio,<sup>3</sup> Sutcliffe, J., said, "Upon payment of his passage money, and obtaining a general receipt, or passenger ticket, from an office, for his conveyance to a designated point upon the carrier's line, the passenger in either case is entitled to present his receipt or ticket for his passage, at any reasonable time, on any outgoing regular means of public conveyance of the carrier, and demand

<sup>1</sup> *McCrae v. Marsh*, *supra*.

<sup>2</sup> 48 Vt. 230; see also *Van Buskirk v. Roberts*, 31 N. Y. 661.

<sup>3</sup> *R.R. Co. v. Bartram*, 11 Oh. St. 457.

the execution of the contract on his part." In its statement of the nature of a ticket this case is still defective ; but it recognizes the fact that there is a binding contract on the part of the carrier.

To much the same effect is the opinion of Earl, C., in *Rawson v. R.R. Co.*:<sup>1</sup> "It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another. The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined."

The true theory seems now to be established in England. The leading case was a Scotch appeal in the House of Lords, *Henderson v. Stevenson*.<sup>2</sup> The question there was as to the effect of a sentence limiting the carrier's liability, printed on the back of the ticket, and did not strictly involve the nature of a ticket ; but the Lords discussed that question at length. Lord Cairns said, "Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *dehors*. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger." It must be admitted that the other lords did not go so far, and were inclined to look on a ticket as a receipt or voucher ; but the view of Lord Cairns seems to be the law of England. In *Burke v. Ry. Co.*,<sup>3</sup> a few years later, where much the same question was before the court, Lord Coleridge said, "The contract, as I understand it, can only be this little book, and the whole of this little book. This is the contract, and these are the terms on which the defendants agreed to take the plaintiff to Paris and back."

The American authorities are not so satisfactory. Until lately the courts have been under the influence of Chief Justice Denio's theory. But the decided tendency is to hold that a ticket is a contract ; and it seems certain that the American courts will, before many years pass, come into general agreement with the English courts. All the later decisions look that way. Thus, in the case of *Sleeper v. R.R. Co.*,<sup>4</sup> Trunkley, J., said, speaking of the purchase of a ticket, "It was a mere purchase of the obligation of a common

<sup>1</sup> 48 N. Y. 212, 217.

<sup>2</sup> L.R., 2 H. L. Sc. 470.

<sup>3</sup> 5 C. P. D. 1.

<sup>4</sup> 100 Pa. St. 259.

carrier, to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action." The Supreme Court of Arkansas, by Cockrill, C.J., lately said, "The carrier selling the ticket was the agent of the appellant for that purpose, and the coupon attached for the appellant's road was a contract by appellant as binding as if issued by its agent here."<sup>1</sup> The Court of Virginia made an ingenious compromise with the old theory:<sup>2</sup> "A passenger's ticket is both a receipt and a contract. It is the acknowledgment of the receipt of the passenger's fare, and the obligation to carry him for the purposes and upon the terms specified."

It seems to be settled, therefore, that railroad tickets, like other kinds of ticket, are now recognized as contracts. This is the most obvious way in which to distinguish a ticket from a mere receipt. As the distinction is an important one it may be well to treat it more at large, and in connection with various sorts of ticket.

A lottery ticket, properly so called, is a contract, conferring on the bearer the right to a chance in the drawing when that occurs. Consequently, after the drawing occurs, if the number of the ticket draws a blank the bearer has no further rights; and if it draws a prize the ticket becomes evidence of the bearer's right to get the money. In the latter case, however, the right to receive the money does not result from the purchase of the ticket, but from the drawing. After the prize is drawn the amount of it is held in trust, as a specific fund, for the holder of the lucky ticket, who can enforce his right by a common money count. The right conferred by the ticket is only to have a chance in the drawing; and after the drawing the ticket is no longer a ticket, properly so called, but a mere receipt.

Another example of what in form was a lottery ticket, but in fact a mere receipt, is found in two English cases.<sup>3</sup> The English statute forbidding lotteries had put an end to legal lotteries, and, of course, to all the customs of the lottery business. But certain persons devised a means of evading the statute. A number of men met and deposited each a certain sum of money; and cards (mis-

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<sup>1</sup> *Ry. Co. v. Dean*, 43 Ark. 529; and see 47 Ind. 79; 7 East. Rep. 838.

<sup>2</sup> *Lacy, J., in R.R. Co. v. Ashby*, 79 Va. 130, 133.

<sup>3</sup> *Jones v. Carter*, 8 Q.B. 134; *Allport v. Nutt*, 1 C. B. 974.

called *tickets*) were prepared, each bearing the name of a horse entered for the Derby. A card was then drawn for each man, and the whole deposit went to the men who drew the cards bearing the names of the winners of the Derby. As a matter of fact the Derby had not taken place when the cards were drawn; but that did not alter the legal nature of the transaction. The card was not like a lottery ticket, for the drawing had taken place; it was a mere voucher to show who was entitled to the money. The one who drew the card would have been entitled to receive his prize just as much if the cards had been destroyed as soon as the drawing was completed. It was rightly held, therefore, that one of these cards could not be transferred so as to bring the transferee into privity with the company.

A theatre ticket is a contract securing the right of admission to a place of amusement. But the coupon, which is detached and retained by the bearer of the ticket, is a mere voucher, showing a right that has already accrued to the holder. At the moment the bearer presents his ticket for admission his right to the seat designated by the coupon accrues; and the coupon is, therefore, a voucher to prove a present right, rather than a contract to secure a future one.

The most important distinctions, however, are those connected with railroad tickets. A railroad ticket, properly so called, is a contract obliging the railroad company to receive the bearer as a passenger. But when once the bearer is so received the obligation is satisfied, and all further rights of the passenger are secured by the custom of carriers, not by the ticket. The conductor should, therefore, cancel the ticket as soon as it is presented to him; and from that moment the ticket becomes (like the coupon on a theatre ticket) a mere voucher, held by the passenger for the convenience, chiefly, of the conductor, to show that the passenger is rightfully on the cars. It is precisely similar in effect to a conductor's check, or the receipt given to a passenger who pays his money in the cars. Such an instrument, as one will easily see, is not a contract, but a mere receipt.<sup>1</sup> That a ticket once cancelled ceases to be a ticket, and becomes a mere receipt, is recognized by the courts. In *Auerbach v. R.R. Co.*,<sup>2</sup> Earl, J., said, "When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched,

<sup>1</sup> *Breen v. R. R. Co.*, 50 Tex. 43.

<sup>2</sup> 89 N. Y. 281.



it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience, but under regulations of the defendant for its convenience, that it might know that his passage had been paid for."

These few examples will perhaps show clearly the distinction between a ticket and a receipt or voucher, and will make it evident that a ticket is a contract. It yet remains to consider what is the nature of the contract.

It will be noticed that a ticket was defined to be an obligation to give something, not money, to the bearer. An obligation to give money to the bearer is a bill, note, or bank-check. It appears, therefore, that there is some analogy between tickets and promissory notes; an analogy that has frequently been noticed in the cases. In view of this analogy the theory naturally suggests itself that a ticket is not a consensual, but a formal, contract, and is to be governed by the principles of the law merchant, and not of the common law.

That there are business customs as clearly and firmly established with regard to tickets as the custom of merchants was, with regard to bills of exchange, in Lord Holt's time, is patent to every one. Nor is there any greater reason why the common law should recognize the custom with regard to bills than that it should recognize the custom with regard to tickets. Even Lord Holt could not prevent the law of Lombard street from moulding the law of England; and after Lord Holt failed to keep promissory notes out of the realm of law no judge dared frown on bills of lading, or bank-checks, or letters of credit. And, if the custom of merchants with regard to bills of lading is recognized by the courts, there seems to be no good reason for refusing recognition to the custom of merchants with regard to tickets.

For the custom is a mercantile one. Tickets are issued in the course of recognized trades. The railroad, the theatre, the inn-keeper, are as fairly in trade, as fairly merchants, as the ship-master, the banker, or the broker. A mercantile contract is not necessarily for the payment of money. A bill of lading is for the delivery of goods; yet it is admitted that the custom governs. Government-bond scrip is for the delivery of a bond, but it is a recognized mercantile contract. Nor is it to be admitted that no new custom will be engrafted into the law. As Cockburn, C. J., said,

in *Goodwin v. Roberts*,<sup>1</sup> " Usage, adopted by the courts, having been the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?"

It may be admitted that at one time, before the custom established itself as it now is, what is now a ticket was a mere receipt, or voucher. It is quite likely that a railroad ticket was originally a mere token to prove to the person in charge of the conveyance that a verbal contract of carriage had been made. In such case, of course, the ticket would not confer a right, but would merely prove a right; and equally of course it could not be transferred except by means of an assignment, good at common law, of the contract of carriage. In the same way a theatre ticket, probably, merely proved that the holder of it had "booked" his place after a primitive system like that now in use in England. Then there was no custom established giving validity to the ticket, and the ticket was not a contract. But, as soon as it became customary to issue these tickets in advance of the right they secured, and to make them good in the hands of the bearer, the custom thus created gave them a character and a power which they did not previously possess. The same process, doubtless, gave validity to a note, which, before the custom was firmly established, was simply evidence of a debt.

As a matter of fact it is evident that a ticket derives all its validity from the custom. The necessary elements of a consensual contract are wanting. The ticket-agent is an agent to sell tickets, not to make contracts for his employer.<sup>2</sup> There is no communication between the contracting parties; the terms are fixed by the custom, and the obligee may be one who has bought the ticket, not from the party issuing it, but from a prior holder. Such a contract as this is, in its essence, a formal, not a consensual, contract.

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<sup>1</sup> L. R. 10 Ex. 337, 352.

<sup>2</sup> *Duling v. R. R. Co.*, 7 East. Rep. 838.

This fact is frequently recognized in the cases. Thus, in *Cheney v. R. R. Co.*,<sup>1</sup> Dewey, J., said, "It is true that the tickets themselves do not describe the passage to be one by the same train. . . . They are silent as to the mode. It therefore was a contract to carry in the usual manner in which passengers are carried who have tickets of that kind." Thompson, J., said, in *Evans v. Ry. Co.*,<sup>2</sup> "These tickets, as is well known, are not *personal* contracts with the particular person who first buys them. . . . They are bought and sold from hand to hand, like shares of stock, negotiable bonds, and other kind of scrip. They are, as is well known, sometimes sold in large quantities by the agents of the railroad companies themselves, to brokers, who in turn sell them at a profit to the travelling public. This being so, unless their terms are perfectly clear and unambiguous, they are liable to deceive and work a fraud upon innocent travellers." In the case of a lottery ticket Allen, Senator (dissenting, but upon a different point), said, in *McLaughlin v. Waite*,<sup>3</sup> "A lottery ticket, as a transferable article, is the same as a bank-note, and was intended to be so considered by the makers of them, and has been so considered by the public."

The ticket is transferable as a contract, by the custom. Tickets are often made to run to the bearer; but even without such words the ticket is generally transferable, unless it is in terms limited to the original holder. In this respect the custom even goes beyond that with respect to promissory notes. They are not negotiable unless words of negotiability appear; tickets are transferable unless words are used to limit their transferability.

This transfer is not the mere assignment of a contract right; it creates a new right against the party issuing it, and extinguishes the previous right of the transferrer. As was said by Story, J., in *Shankland v. Corporation of Washington*,<sup>4</sup> with regard to a lottery ticket, "As owner and possessor of the whole ticket, if he had made a sale of the whole . . . he would have substituted another as possessor and transferer, to whom the original promise of the corporation would then have attached." The exact point came up to be decided in a late case in Pennsylvania, *Sleeper v. R. R.*

<sup>1</sup> 11 Met. 121; see also Smith, J., in *Gordon v. R. R. Co.*, 52 N. H. 596; Paige, J., in *R. R. Co. v. Page*, 22 Barb. 130; Wheeler, J., in *Jerome v. Smith*, 48 Vt. 230.

<sup>2</sup> 11 Mo. App. 463, 469.

<sup>3</sup> 5 Wend. 404, 411; and see *Snyder v. Wolfley*, 8 S. & R. 328, 331.

<sup>4</sup> 5 Pet. 390, 393.

*Co.*<sup>1</sup> The plaintiff in that case purchased a ticket over the railroad of the defendant company from a "ticket-scalper" in New York. A Pennsylvania statute forbids holders of railroad tickets to sell them. The defendant refused to carry the plaintiff, and he brought an action of contract in Pennsylvania. It was objected, that he was attempting to enforce the contract of the scalper, and that the scalper had no right to sell. The court, however, gave judgment for the plaintiff. In the course of his opinion Trunkey, J., said, "It [the contract] is purposely made so as to entitle the *bona fide* holder to performance, and for breach to an action in his own name. . . . It is true, as claimed by the defendant [in error, *i. e.*, Sleeper], this action is to enforce not the contract between the ticket-scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error. . . . As the plaintiff has a valid title to the ticket the contract between the defendant and himself is valid."

A transaction of this nature is not the assignment of a right ; in that case the assignee claims through the assignor, even where (by statute) he may sue in his own name. But it is a true transfer, like that of a promissory note by endorsement ; all the right that was formerly in the transferrer has left him and gone to the transferee, who claims in his own right.

The question whether a ticket is negotiable raises a much more difficult question ; but, on the whole, there seems no reason for making a distinction in this respect between tickets and promissory notes. The custom certainly is to take tickets without any inquiry as to the title of the prior holder ; and such a custom is favorable to the purposes of trade. It is certain that railroads taking tickets from passengers must be protected ; and there is no reason for making any distinction between the maker of a ticket and the holder of it. It may be remembered that in the early days of the late war, when small change was scarce, horse-car tickets passed readily from hand to hand as currency ; and postage-stamps served the same purpose. It is evident that at that time those tickets were regarded as negotiable. It is probably the general understanding now that tickets are negotiable.

Such is the weight of authority. With regard to lottery tickets it is well established that they are negotiable. In most of the cases they are compared to bank-notes payable to bearer. The leading

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<sup>1</sup> 100 Pa. St. 259.

case in this country, so often referred to, *Shankland v. Corporation of Washington*,<sup>1</sup> was a case where the owner of a ticket issued a sub-ticket, entitling the holder to half of the prize. The owner of the whole ticket collected the money and disappeared with it, and the owner of the half-ticket sued the maker of the ticket. It was held that he could not recover. In the course of his opinion Story, J., said, "If this had been the case of a bank-note payable to bearer, there is no pretence to say that a person claiming a moiety by contract with the bearer, could have maintained a suit against the bank upon such contract for the moiety; when the note itself had been surrendered up to the bank by the bearer. In what respect does such a case differ from the present? Suppose, after this sub-ticket was issued, Gillespie had sold and delivered the whole ticket to another person, having no notice; would not the latter have been entitled to recover the whole prize from the corporation? If so, would the corporation still be liable to pay the half prize to the plaintiff?"

That was a case where equities were discharged by purchase for value. But as a ticket is a contract with the bearer, if it is negotiable, purchase for value must be a source of title, giving to the bearer a title which the previous owner may not have had. The point came up in a case in Pennsylvania, and it was distinctly so held. It was a case where the owner of a lottery ticket who had lost it sued for the prize drawn against the number of the ticket. Gibson, J., said in that case,<sup>2</sup> "The fruits of the ticket were payable to the bearer; and the defendants could not resist payment of it in the hands of a *bona-fide* holder for valuable consideration, even though it should originally have been stolen."

The authorities with regard to railroad tickets are more conflicting. *Sleeper v. R. R. Co.*, cited just above, goes a long way toward holding a ticket negotiable. On the other hand, a late Ohio case has held a ticket not to be negotiable.<sup>3</sup> This case, however, was distinctly decided on the ground that a ticket is not a contract, but a voucher, and can be regarded as authority only where that theory is held. It is not perhaps too much to say that wherever the true theory, that a ticket is a formal contract, is recognized, the ticket will be held negotiable.

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<sup>1</sup> 5 Pet. 390.

<sup>2</sup> *Snyder v. Wolfley*, 8 S. & R. 328, 331; and see *McLaughlin v. Waite*, 5 Wend. 404.

<sup>3</sup> *Frank v. Ingalls*, 41 Oh. St. 560.

The theories that I have advanced in this essay will, I think, be confirmed by examining the rules regulating the issue and use of tickets which have been established by authority. These rules correspond in all respects with those established in the case of notes payable to bearer; and new questions would doubtless be settled in accordance with the law of negotiable paper. It is necessary to pass over these points as rapidly as possible.

A ticket, then, must be in regular form. The name of the maker should be on it, and the necessary terms of the contract. In some cases a peculiar color, or other distinguishing mark, is used to designate the terms of the ticket. A ticket must always, it seems, be printed; some of the terms may be written, but they must be written in a printed form.

Like other formal contracts a ticket takes effect only from the time of its delivery; before that the ticket is waste paper. The delivery is generally made on behalf of the company by an agent, called a ticket-agent. The powers of a ticket-agent are exceedingly limited. He is authorized only to sell a ticket for cash. He cannot sell on credit,<sup>1</sup> nor can he make representations as to the general affairs of the company. He is simply an agent for the sale of tickets,<sup>2</sup> not to make contracts;<sup>3</sup> and his representations bind the company only when they are representations as to the validity of the tickets he sells. Thus, if he sells a punched ticket, representing it to be a good one, the company is liable on the ticket;<sup>4</sup> though if he gives a ticket for B, when the passenger calls for and pays for a ticket to A, the passenger can ride only to B on the ticket.<sup>5</sup> In fact, the powers of a ticket-agent are the ordinary powers of an agent for sale.

A ticket to be good against the company requires some consideration to have been given for it, otherwise it may be repudiated by the company. A free pass, for instance, may be revoked at any moment until it is actually used.<sup>6</sup> But the consideration need not have been a valuable one. Any consideration that would support a promissory note would support a ticket. Thus, a theatre ticket sent to a dramatic critic is binding. A man travelling on a free pass given him by the railroad company, under an agreement

<sup>1</sup> *Frank v. Ingalls*, 41 Oh. St. 560.

<sup>2</sup> *Pennington v. R.R. Co.* 62 Md. 93.

<sup>3</sup> *Duling v. R.R. Co.*, 7 East. Rep. 838.

<sup>4</sup> *Murdock v. R.R. Co.*, 137 Mass. 293; and see to the same effect, *Hufford v. R.R. Co.*, 31 N. W. Rep. (Mich.) 544; *Young v. R. R. Co.*, 7 Atl. Rep. (Pa.) 741.

<sup>5</sup> *Frederick v. R.R. Co.*, 37 Mich. 342.

<sup>6</sup> *Turner v. R.R. Co.*, 70 N.C. 1.

that if he would come and show a coupling he had invented the company would pay his expenses, was held not to be travelling as a "free or gratuitous passenger,"<sup>1</sup> and doubtless the pass could not be revoked. The same court has held that a drover, travelling with his stock on a free pass, or "drover's ticket," was a passenger for hire.<sup>2</sup>

As in the case of any formal contract it is essential to the validity of the obligation that the consideration, whatever it was, shall not have failed. A ticket, therefore, purchased with a counterfeit bank-note, is not binding on the company, although the purchaser did not know the note to be a bad one.<sup>3</sup>

When the ticket has become operative in the hands of a holder he may pass his right by mere delivery,<sup>4</sup> as he may in case of a note payable to bearer. For this reason it is held that the price of lottery tickets may be recovered in an action for goods sold and delivered;<sup>5</sup> as is true also of promissory notes.

A railroad ticket is generally presentable immediately, and if any time is set it is the time beyond which the ticket will not be good. But it may be presentable at a fixed time, as is usually the case with excursion tickets. Other sorts of ticket are generally to be used at a fixed time.

A ticket, like a note, must be presented to the maker when the time comes for the performance of the contract. There seems to be an exception to this rule in case of a lottery ticket. If a lottery ticket secures the right only to the drawing of the lottery the ticket is not then surrendered. That is natural enough, since if anything comes to the holder it comes after the drawing; and the ticket is a necessary piece of evidence to enable the holder to secure his prize, if he is fortunate. All other tickets must be surrendered at the moment of performance. They then cease to be tickets. If such a ticket is returned to the prior holder he holds it, as has been seen, simply as a receipt.<sup>6</sup> It is much like a cancelled bank-check.

Since the performance of any formal contract is conditional on the surrender of the instrument it is clear that the loss of a ticket before it is surrendered must fall upon the holder.<sup>7</sup> As Wheeler,

<sup>1</sup> *Railway Co. v. Stevens*, 95 U.S. 655.

<sup>2</sup> *R.R. Co. v. Lockwood*, 17 Wall. 357.

<sup>3</sup> *R.R. Co. v. Chastine*, 54 Miss. 503.

<sup>4</sup> *Snyder v. Wolfley*, 8 S. & R. 328; *Jerome v. Smith*, 48 Vt. 230.

<sup>5</sup> *Yohe v. Robertson*, 2 Whart. 155.

<sup>6</sup> *Auerbach v. R.R. Co.*, 89 N. Y. 281.

<sup>7</sup> *Standish v. Steamship Co.*, 111 Mass. 512; *Crawford v. R.R. Co.*, 26 Oh. St. 580; *Shelton v. Ry. Co.*, 29 Oh. St. 214.

J., said forcibly in *Jerome v. Smith*:<sup>1</sup> "The mere fact of having had it, without having it to deliver in payment on reasonable request, would not entitle any one to the passage, any more than having a sufficient amount of money to pay the fare with, without paying it, would." <sup>a</sup> The Supreme Court of Illinois, in the case of *Pullman Palace Car Co. v. Reed*,<sup>2</sup> attempted to limit this rule, but the limitation would hardly be approved elsewhere.

When the ticket has been lost, or destroyed, recovery may be had as in the case of a lost bill; that is, by a bill in equity offering indemnity. In those jurisdictions where recovery may be had at law on a lost note, upon giving indemnity to the defendant, the same thing may be done in case of a lost ticket. Such was the case of *Snyder v. Wolfley*<sup>3</sup> in Pennsylvania. In that case Gibson, J., said, "With respect to a negotiable security which passes by mere delivery, and which is not destroyed but *lost*, the remedy is always in chancery, on terms of giving security against the defendant's eventual liability. . . . By the express terms of the ticket, whatever prize should be drawn opposite to its number, was to be payable only to the bearer; which by necessary implication, would require the production of the ticket itself; or as an equivalent, in case of its loss, security against damage from payment being made without having it delivered up."

The fact that the ticket must be delivered to the maker at the time of performance has an important effect upon the right secured by a railroad ticket. As performance is concurrent with surrender, performance must be regarded as a unit. As soon, therefore, as the passenger is received upon the train, and his carriage toward the point of destination begun, the contract secured by the ticket is performed; or, at least, the only right of the ticket-holder is to be carried through safely to his destination. Accordingly, a ticket is used as soon as the train starts on its journey; its surrender may then be called for by the conductor. This point appears clearly in a case already referred to, *Auerbach v. R.R. Co.*<sup>4</sup> In that case a ticket from Buffalo to New York was to expire on the 26th of September. On the evening of that day the bearer took the train for New York, and his ticket was called for and punched. He was allowed to travel until after midnight, but early in the morning of the 27th he

<sup>1</sup> 48 Vt. 230.

<sup>2</sup> 75 Ill. 125.

<sup>3</sup> 8 S. & R. 328.

<sup>4</sup> 89 N. Y. 281; *Evans v. Ry. Co.*, 11 Mo. App. 463 to the same effect.



was ejected from the train. He sued for damages, and the Court of Appeals held that he was entitled to recover.

For the same reason the ticket-holder has no right, upon a single ticket, to travel a part of the way on one train, and the rest of the way on another train. This is dividing the performance into two parts; a thing that may not be done in case of a formal contract. If the passenger leaves the train before he reaches his point of destination he has no right, unless he has first obtained permission from the company, to ride on to the point of destination upon the same ticket.<sup>1</sup>

There is no reason, however, for requiring the passenger to take the train at the station named as the beginning of the journey. So long as the passenger enters the train between the points named on the ticket, and rides no further than the point of destination of the ticket, he has a right to present his contract for performance. Thus, a passenger having a ticket for New York from Buffalo may enter the train at Rochester,<sup>2</sup> or may leave it at Albany.

The bearer of a ticket, however, cannot entirely change its terms, even if he puts no additional burden upon the company. A ticket from Portland to Boston will not, as a matter of right, entitle the bearer to a passage from Boston to Portland.<sup>3</sup>

A ticket may be issued by one who is not in the position of maker; thus, one railroad may issue tickets over the line of another road. It has generally been said that the railroad issuing the tickets acts as agent of the road over whose line the ticket is issued;<sup>4</sup> but this theory is difficult to sustain in all cases, for a company often issues tickets where there is no agency in fact. Thus, in *Hudson v. Ry. Co.*,<sup>5</sup> the Kansas-Pacific Company, not being authorized to do so, sold tickets over the line of the Denver and Rio Grande Company. The latter company refused to allow a passage over its road on the tickets. The court held the Kansas-Pacific Company justified in issuing such tickets, and held it liable in an action upon the ticket. This sort of ticket is much like a bill of exchange; the drawer being liable if the drawee refuses to accept the instrument. It seems that this is the true nature of the

<sup>1</sup> R.R. Co. v. Bartram, 11 Oh. St. 457; Cheney v. R.R. Co., 11 Met. 121; Vankirk v. R.R. Co., 76 Pa. St. 66.

<sup>2</sup> Auerbach v. R.R. Co., 89 N. Y. 281.      <sup>3</sup> Keeley v. R.R. Co., 67 Me. 163.

<sup>4</sup> Brooke v. Ry. Co., 15 Mich. 332; Ry. Co. v. Dean, 43 Ark. 529.

<sup>5</sup> 3 McCrary 249; and see Cloud v. Ry. Co., 14 Mo. App. 136, 143, 145.

ticket in such case, and that the rules regulating the use of bills of exchange would apply. Action would lie against the company, therefore, only upon the refusal of the second company to honor the ticket, followed by seasonable notice to the first company; unless, indeed, as is often the case,<sup>1</sup> the company issuing the ticket may be regarded as the agent of the other to accept the ticket.

*Joseph H. Beale, Jr.*

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<sup>1</sup> See *Young v. R.R. Co.*, 7 Atl. Rep. (Pa.) 741.

# HARVARD LAW REVIEW.

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## NOTES.

IN publishing the first number of the HARVARD LAW REVIEW the editors feel it necessary to offer a few words of explanation. The REVIEW is not intended to enter into competition with established law journals, which are managed by lawyers of experience, and have already a firm footing with the profession.

Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the REVIEW may be serviceable to the profession at large. From the kind offers of assistance on the part of the professors in the Law School, and from the list of the alumni who have consented to write for the REVIEW, we feel sure that the contributed articles will prove of permanent value.

It will be our aim to develop the REVIEW on the lines we have indicated, in the hope of deserving the support which we have already received. If we succeed, we shall endeavor to enlarge our field as much as is consistent with our plan. If we fail, we shall at least have the satisfaction of believing that our work has been honestly done in the interests of the Law School and of its alumni.

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DURING the present year a new departure has been made in the line of student law-trials, which, owing to the fact that it bids fair to become a permanent feature of student work, is worthy of some comment. The plan embodied the conduct of a complete jury trial from the formal opening of court to the rendering of verdict, and, in spite of many obstacles, has been carried out with remarkable success. The object was to assimilate the trials as nearly as possible to actual trials. This has

been accomplished by the selection of fully reported cases, the giving out of testimony in parts to those acting as witnesses, and the requiring the counsel to work up the case entirely from the testimony procured from the witnesses, without previous knowledge of the case from the report.

One is struck with the value in many ways of such trials, provided they are not undertaken too frequently. The student of law, from the nature of his work, is barred from that varied intercourse with men, that personal element, we may call it, which renders the practice so fascinating, and any plan which makes it possible for the student to introduce something of this into his work is to be commended. Aside, too, from the excellent practice afforded to those who take part, such trials may be made a means of familiarizing those who witness them with the actual court practice of English and American courts. One other point suggests itself. The Law School has hitherto furnished nothing to attract the college students within its walls, and kindle an interest among them in the study of the profession which so many of them adopt. Does not this year's experience show that these trials are adapted to serve just that purpose?

There is one weakness in the trials as now conducted which it would be well for those to remedy who have it in hand next year. As yet no way has been found in which to make the cross-examinations a complete success. The counsel ought, in some way, to be given a broader knowledge of the case, which might serve as a basis for cross-examination.

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As the comparative merits of a third year at the school, and a third year in a lawyer's office, are so often discussed, the following extract from President Eliot's last report may be of interest both to graduates and under-graduates: "It is good evidence of the value of the full three years' course that, for several summers past, the school has been unable to fill all the places in lawyers' offices which have been offered it for its third-year students, just graduating. There have been more places offered, with salaries sufficient to live on, than there were graduates to take them."

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PROFESSOR LANGDELL, in his last report, says, in regard to the Harvard Law School Association, "That the Association has already rendered a very valuable service to the school there can be no doubt; and, if its influence has not already been felt in increasing the number of students in the school, it is doubtless because sufficient time has not yet elapsed to enable it to make itself felt in that way. The gentlemen who conceived and started this enterprise, and who have spared neither time nor labor in carrying it out, are entitled to the lasting gratitude of every one who has the welfare of the school at heart."

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It may not be generally known that a chair of international law will eventually be established as a regular professorship in the school. A sum of about \$50,000 has been left for this purpose, subject only to the life estate of the testator's sister. At her death, then, the corporation

will come into possession of this amount, and another professorship will be added to those which the school already possesses. The course in international law, which is now one of the regular college courses in history, will be transferred to the school, but will, undoubtedly, be open to members of the college department if they care to attend the lectures. If possible a gentleman who has had some experience in diplomatic affairs is to be selected to fill the chair.

It is a matter which ought to be thoroughly understood by the students, in choosing their courses, that Professor Langdell's third-year courses are what may be called alternative. Each of them is, in a sense, a two-years' course. Take Equity Jurisdiction for example: this year the basis of the course has been Contract, while next year the subject will be taken up in its relation to Tort. There are, of course, minor branches of the subject which cannot be classified strictly upon this basis, and they are taken up where they seem most properly to belong; but the distinctive features of the two courses may be said to be Contract and Tort.

The name of Professor Langdell's other third-year course—Suretyship and Mortgage—suggests at once the division. Personal Suretyship is discussed one year, Real Suretyship the next. An advantage of the "case system" is seen in its easy adaptability to a division of this kind. The cases may be placed immediately under the one head or the other, as there is an obvious and easy line of distinction. On the other hand, should one attempt to classify the principles according to this distinction he would find himself involved at least in repetition, if nothing worse, since, in general, the foundation principles of Real and Personal Suretyship are the same, though so different in application as to render the separate treatment of the two subjects important.

THE formation of the Selden Society, in England, is an event of the deepest importance to all students in the history and philosophy of the law. The object of this society is, to promote study and investigation in the early principles of the law. No history of the English law, worthy of the name, has ever been written, and, to-day, no book would be more favorably received than a history embracing the genesis of the common law and of equity. At the meeting which brought the English society into existence Lord Coleridge expressed himself strongly of the opinion, that a knowledge of the history of English law is of great importance, both to those who occupy places upon the bench and to those who plead causes at the bar. The historical method of study is the surest path to a sound appreciation of principles, and it is only by a careful inquiry into these principles that a lawyer, or judge, can prepare himself to give a sound opinion upon a given proposition at short notice. With these views the other speakers, including Frye and Lindley, L.JJ., expressed themselves in hearty sympathy. It is worthy of note that Minister Phelps occupied an important position in the first meeting of the society. In moving the first resolution he used the happy expression, that the English law was "a great factor in modern civilization." To produce an harmonious history of this great force, this English common law, which is no longer confined to the bounds of the British realm, is the hope and expectation of the Selden Society.

## THE LAW SCHOOL.

## IN THE MOOT COURT.

*Coram* GRAY, J.*Joseph Fraine v. Matilda Fraine.*

A divorce for desertion will not be granted where the libellant has filed, during the continuance of the alleged desertion, another libel for divorce on account of adultery.

The libel for divorce on account of adultery operates as notice to the libellee that a renewal of cohabitation is not desired, so that the libellant becomes thereby a consenting party to the separation.

Cases decided under the English statute distinguished.

**L**IBEL for divorce on the ground of desertion, filed Feb. 19, 1886. The libel was undefended. At the hearing it appeared that the parties were married in 1879; that on Jan. 10, 1882, the libellee deserted the libellant, and had continued away from him to the time of filing the libel; that in March, 1885, the libellant discovered evidence tending to show adultery on the part of the libellee; that in May, 1885, he filed a libel against her on the ground of adultery, to which she filed an answer, which libel is still pending.

The libellant testified as a witness. He was asked by the judge whether he would have taken the libellee back at any time before the filing of the libel. He said he would have taken her back at any time before he discovered the evidence tending to show her adultery, but that he would not have taken her back after that time. There was no evidence that he had ever said this to the wife.

The judge reserved the case for the determination of this court.

A statute provides that a divorce from the bond of matrimony may be decreed, among other causes, for adultery, and for "desertion continued for three consecutive years next prior to the filing of the libel."

The Attorney-General appears under a statute providing that he intervene to oppose the granting of any libel undefended by the libellee.

*H. M. Williams* and *J. V. Bonnett* for the Libellant.

*S. Williston* and *E. G. Brooks* for the Attorney-General.

GRAY, J. Whether a secret determination by a husband, whose wife has left him, not to take her back, would, if proved, defeat a libel against her for desertion, or whether a like determination expressed to a third person would have that effect, it is unnecessary in this case to consider; for the filing and service of the libel for adultery was a declaration to the libellee of the most solemn kind that her husband would not take her back. If not absolutely incompatible with a willingness to receive her, it must be deemed so in the absence of countervailing evidence, of which there is none here. Nor does the libellant much dispute this position.

But he contends that if a wife who has deserted her husband has a fixed intention not to return, whatever her husband's wishes, the desertion continues, although the husband has declared that he will not take her back; and for this the libellant relies on *Hewes v. Hewes*, 7 Gray, 279, where, on an undefended libel, it was held that a man had deserted

his wife for five years consecutively, although for the greater part of the five years he had been in prison. This case, if it be good law, shows that a deserted wife is not to be deprived of the right which she would have to a divorce, simply because her husband, by his own misconduct, has rendered impossible that return, which, if possible, he would never have attempted. But it is of the essence of her right that she is injured by the continued absence of her husband, and if she consents to this continued absence, she is not injured, and has no right to a divorce.

The libellant, however, further insists that, although it be true, as a general proposition, that the consent of a libellant to a continued desertion is fatal to the libel, yet there is an exception; and he argues that if the consent to the desertion is for a justifiable cause, as in this case, the libel can be maintained. To establish this exception he relies on several English cases, *Graves v. Graves*, 3 S.W. & T. 350; *Gibson v. Gibson*, 29 L. J. M. 25; *Gatehouse v. Gatehouse* 36 L. J. M. 121; some of which, at any rate, support his contention.

But this exception rests on the special terms of the English statute. Desertion was never a cause of divorce in England, until the statute establishing the Divorce Court, 20 and 21 Vict., c. 8 (1857). There it appears for the first time. By that statute a woman cannot have a divorce for adultery alone, as for desertion alone; but for "adultery coupled with desertion, without reasonable excuse, for two years or upwards," § 27.

Under this provision, if a man deserts his wife for two years, and also commits adultery, but his wife does not discover the adultery until after the expiration of the two years, and has, therefore, during the two years been always desirous for his return, she is clearly entitled to a divorce; but suppose that before the two years have elapsed she discovers that her husband is living in adultery, now, under these circumstances, the law must be either: *First*, That she is bound to take her husband back; or, *Second*, That she is not entitled to a divorce; or, *Third*, That she is entitled to a divorce, although she is not willing to take her husband back.

The English statute cannot have intended to declare either of the first two of these propositions. It cannot mean that she is bound to take back her husband; it cannot mean that she is entitled to a divorce from a secret adultery, but not from an open one. The third proposition must, therefore, express the intention of the statute, and the word "desertion," as used therein, cannot have its ordinary meaning of going and staying away without consent, but must include a going and staying away with justifiable consent.

This novel and exceptional meaning of the word desertion is the result simply of the dilemma brought about by the English statute coupling adultery and desertion as a cause for divorce; but under the statute in this case, where either offence is alone a sufficient cause for divorce, the dilemma does not arise, and there is, therefore, no occasion to give an artificial meaning to the term desertion, or to use it in any other than its natural sense. This result is in accordance with the American authorities. *Porritt v. Porritt*, 18 Mich. 420; *Salorgne v. Salorgne*, 6 Mo. Ap. 602.

If the libellant wants a divorce from his wife he must prosecute the libel for adultery.

*Libel for desertion dismissed.*

## IN THE CLUB COURTS.

SUPREME COURT OF THE AMES-GRAY.

*Contract implied in law. Improvement of another's property under mistake, in good faith.*

The facts were the same as in *Mining Co. v. Hertin*, 37 Mich. 332. The plaintiff, under a *bona-fide* mistake as to boundaries, cut trees on the defendant's adjoining land, converted them into cord-wood, and hauled them to the shore of the lake. The wood there was worth three times as much as it was in its original condition. The defendant, then finding out for the first time what had been done, took possession of the wood, and received the benefit of all the plaintiff's labor, for which *indebitatus assumpsit* is brought.

The plaintiff contended that the defendant had enriched himself at the plaintiff's expense, that the plaintiff was not officious in his conduct, so the common counts would lie. *Ambrose v. Kerrison*, 10 C. B. 776; *Chase v. Corcoran*, 106 Mass. 286. That there is an equity in favor of the plaintiff is shown by the fact that a bill in equity would lie for the value of the improvements, in the analogous case of realty improved under a mistake. *Bright v. Boyd*, 1 Story, 478; *Thomas v. Thomas*, 16 B. Mon. 420.

The defendant argued that the law would not imply a consent to a trespass. As he had no knowledge of the plaintiff's labor there was no implied assent to it.

The court decided in favor of the defendant. A trespasser at common law is a wrong-doer; no wrong can give the wrong-doer a right of action. The cases in equity do not apply, for equity can probe the plaintiff's conscience; they rather show there is no remedy at law. In the cases cited, where recovery was allowed, the plaintiff had not exceeded his legal rights.

SUPERIOR COURT OF THE POW-WOW.

*Tort for injury to horse from a barbed-wire fence.*

The ground of action in this case consisted of two facts, viz., the erection of the fence by the defendant and consequent injury to the plaintiff's horse.

The defendant demurred, maintaining that he was not liable unless the plaintiff also declared and proved that the fence was erected in an improper place, where the injury complained of would be the natural result. In support of this defence the defendant cited *Polak v. Hudson*, *New Jersey Law Journal*, Feb., 1887, p. 43, a case directly in point, in which the defendant's liability, according to the charge to the jury, seems to turn on the fact that the defendant placed the fence between his land and the plaintiff's pasture, knowing that the plaintiff was accustomed to turn a young colt into the pasture, and that; therefore, injury would naturally follow.

But the court held that a barbed-wire fence, *per se*, was so dangerous, that in case of resulting injury the plaintiff should be allowed to recover, unless the defendant, confessing the plaintiff's cause of action to be good, could also show that, from the nature of the ground, as, for example, a thick woodland, or from public policy, as fencing with barbed wire tracts of prairie land to prevent stampede, the maintenance of the fence was justifiable.



A barbed-wire fence, therefore, was deemed to come within that class of sources of injury as to which no averment of negligence or of knowledge of probable injury is necessary, as the following: a poisonous yew-tree, *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5; a filthy drain, *Ball v. Nye*, 99 Mass. 582; an open pit, *Growcott v. Williams*, 32 L. J., 2 B. 237; a rusty wire-cable fence, *Firth v. Bowling Iron Co.*, 3 C.P.D. 254; a reservoir, *Ryland v. Fletcher*, L.R., 3 H.L. 330.

#### FROM THE LECTURE ROOM.

These notes were taken by students from lectures delivered as part of the regular course of instruction in the school. They represent, therefore, no carefully formulated statement of doctrine, but only such informal expressions of opinion as are usually put forward in the class room. For the form of these notes the lecturers are not responsible.

**TRANSFER OF CHoses IN ACTION.** (*From Professor Ames' Lectures.*) — In England, by the Statute 36 and 37 Vic., c. 66, § 25, rule 6, the legal right to a chose in action is transferable. Before the passage of this act, however, and in jurisdictions where it is not in force, conflicting decisions have been reached in cases where the obligee of a chose in action has attempted to make a gift of it to another.

In *Fortescue v. Barnett* (3 M. & K. 36) the obligee of a life-insurance policy by deed assigned and transferred the policy to F. It was held that the gift of the policy was complete without delivery; F. had a perfect title. This case has been followed by later English cases. 14 Ch. D. 179.

In the case of *Edwards v. Jones* (1 M. & C. 226) the obligee of a bond indorsed upon it an assignment to E., "with full power for said E. to sue thereon," and delivered the bond to E. It was held that this was an imperfect gift, and the donee took nothing. *Edwards v. Jones* has been followed in England, *Milroy v. Lord* (4 DeG., F., & J. 264). Thus, in that jurisdiction a distinction is made between an insurance policy and other choses in action.

On the other hand, in the United States generally no such distinction has been made. The rule is that a gift accompanied by a delivery of the instrument passes the legal title; while without delivery no interest passes. (*Grover v. Grover*, 24 Pick. 261; and note to same in Ames, *Cases on Trusts*, 110.) The American rule, therefore, is directly opposed to the rule of *Edwards v. Jones*.

It is suggested that the true solution of this question is the following: when the donor gives the instrument to the donee, intending to make a complete gift, there is a valid transfer by way of an implied execution of an irrevocable power of attorney to sue in the name of the donor. Thus the right of the donee is not equitable, but is legal.

This suggestion has not been adopted by the courts; but it seems to have the merit of carrying out the intention of the parties, and reaching a highly desirable result (as is shown by the English statute and the American decisions, which reach the same end by another course of reasoning) without doing violence to any legal principles.

It is by no means a new idea. A power of attorney executed for a consideration gives a right to sue in the name of the transferor of the chose in action.

1 Lilly Abr. 103; 2 Bl. Com. 442; 2 Story Eq. Juris. § 1056; Co. Lit. 232 B, Butler's note; 8 T.R. 571; L.R. 2 C.P. 308, 309.

EQUITY, SPECIFIC PERFORMANCE, EQUITABLE CONVERSION AND OWNERSHIP. (*From Professor Langdell's Lectures.*) — Equity has deduced from specific performance two important and far-reaching principles which affect the substantive rights of parties. One principle is that of equitable conversion; the other is, that the party entitled to a thing under a contract is regarded as owner of it in equity. Equitable conversion takes place when the result of the contract will be an actual conversion of property into realty or personalty; equitable ownership takes place when the performance of the contract will change the ownership.

The establishment of these principles is not a necessary consequence of enforcing specific performance. If the principle of equitable ownership had not been recognized, specific performance might easily have been prevented by conveying the property; yet the principles are entirely independent. The question of equitable conversion ought to stand and be decided by itself, without reference to the question whether the agreement will be specifically enforced. This distinction is not recognized or acted on in the authorities, which decide as if the question rested on enforcing specific performance.

The foundation on which these principles are established is the equitable principle of treating as done what ought to have been done, from the time when it should have been done. Equity adopted this as a principle of fundamental justice, and the justice of it had to be made clear before it was adopted. It should clearly extend only so far as it would do justice, and should not stop at the point where equity refuses to enforce specific performance.

Suppose, for instance, a contract for the sale of a vessel; the purchase-money has all been paid, but title to the vessel has not been conveyed. After the time for conveyance arrives the vendor becomes bankrupt. Even if equity will not enforce specific performance of the contract it should treat as done what ought to have been done, and should enforce the vendee's right to the vessel against the assignee, as it would enforce the right of any other *cestui que trust*. If the vendor remained solvent there would be no reason for invoking the jurisdiction of equity.

This rule is recognized and acted upon in a leading case in Massachusetts, *Clark v. Flint* (22 Pick. 231), where the facts were substantially those stated above.

## CORRESPONDENCE.

WASHINGTON, D. C.

TO a lawyer the most interesting point in Washington is the old Senate Chamber at the Capitol, for it is there that the Supreme Court of the United States now sits.

De Tocqueville, writing over fifty years ago, declared that the Supreme Court was "placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls." And one who contemplates the history of the court during the ninety-seven years of its existence, as to the work that it has done, both in moulding the development of the constitution and in adjusting and regulating the conflicting rights of the federal government and the several State sovereignties, will agree with the learned Frenchman.

October Term 1886 has not been lacking in cases of far-reaching importance. It was ushered in by the judgment in *Wabash, St. Louis and Pacific R.R. Co. v. Illinois*,<sup>1</sup> which prepared the way for the enactment of the Interstate Commerce Law. Whatever the defects of that measure may be, either in its provisions or in the policy which it embodies, the commissioners to whom its execution has been entrusted are men of such a stamp as to give promise that the best result of which it is capable will be derived from the law; indeed, a more judicious selection could hardly have been made, the appointment of Judge Cooley to the long term especially meeting with universal approbation. Following the decision of the *Wabash* case have come a series of others, involving the power to regulate commerce, among them the *Drummers' Tax Cases*, very recently decided, in which Mr. Justice Bradley delivered one of his most masterly opinions.

A case of especial interest to the friends of the Indians in Massachusetts was that of *Choctaw Nation v. United States*,<sup>2</sup> in which a large sum of money, over two and a half million dollars, was at last recovered by the Choctaws in satisfaction of injuries suffered by them in the execution of the treaty of 1830; and one will hardly read the statesmanlike opinion of Judge Matthews without becoming satisfied of the justice and sound morality of the conclusions reached, even if a more technical consideration of the principles of law applicable to the question may seem to render the result more doubtful. No appropriation was made by the last Congress to pay this judgment.

*United States v. Rauscher*<sup>3</sup> is noteworthy as involving the much-mooted question of the right to try a person for a crime other than that for which his extradition was secured; the opinion of the court denying the right, under existing treaties, may not be wholly satisfactory as a legal argument, but it must not be forgotten that the question depends rather on political than judicial principles for its proper determination. Indeed, this case and the *Choctaw* case excellently illustrate how the court is constantly called upon to deal with matters which in all other countries are regarded as not pertaining to the judicial power; and they also show a sound tendency to

<sup>1</sup> 118 U.S. 557.<sup>2</sup> 119 U.S. 1.<sup>3</sup> 119 U.S. 407.

treat such questions in a broad spirit, and not to apply the rules of law too literally.

*Wildenhus's Case*,<sup>1</sup> decided early in January, brought up a point of importance in international law affirming the right of a State to take jurisdiction of a crime committed by a foreigner against a foreigner upon a foreign merchant vessel anchored in one of the ports of the State.

But undoubtedly the cause that has attracted most attention this winter, although it cannot be deemed of such overweening importance, aside from the magnitude of the pecuniary interests involved, is that known as the *Telephone Cases*. Popular interest in these suits was excited to a high degree, stimulated by a notoriety due to the utter recklessness with which attacks were made by the one side and the other upon all persons, high or low, supposed to be opposed to them. During the whole of each sitting, for the twelve days devoted by the court to hearing the cases argued, the court-room was filled with spectators, eager to witness the conflict. All the parties were represented by counsel of eminence; but the Bell Company had the advantage of a concentration of effort and unity of purpose on the part of its representatives that was far from existing among the appellants, whose interests were distinct and in some degree conflicting, as their counsel took pains to point out. The merits of the controversy, in which no decision has yet been rendered, have been freely canvassed, and those who most carefully followed the proceedings have arrived at very different conclusions.

Not the least reproach upon the memory of the 49th Congress is its failure to provide any relief for the condition of business before the Supreme Court. It has long been notorious that, owing to the overcrowded condition of the docket, no case could be reached for argument, in its regular order, in less than three years after the appeal was filed; and, although the liberal rule allowing any case on the docket to be submitted on printed briefs without argument during the first ninety days of the term prevents any notable increase of delay, and lessens the hardship in many instances, yet the court is unable to make any headway in clearing off its arrears. The evil is a serious one, oppressive to suitors and encouraging frivolous appeals, and it is an evil which the court itself is powerless to remedy.

Anything which tends to lessen the expense of litigation is a source of congratulation, and such will be the effect, as to appeals here, of a rule recently promulgated by the Supreme Court. Heretofore it has been the practice to print the entire transcript of record from the court below, often at an expense of hundreds of dollars, although the questions involved in the appeal might require only a small part of it for their proper determination. The rule announced from the bench on the last Monday in March will go far to stop this; it gives permission to the appellant to print only so much as he deems necessary, unless required by the appellee to print other parts, and, by reserving full power as to allowing costs, the court provides for protecting either side from the unfair exercise of its rights by the other.

Two acts of some importance as to judicial matters were passed at the last session: the one to amend and regulate the law as to the jurisdiction of the United States Circuit Courts, and the other providing for the

<sup>1</sup> 120 U.S. 1.

prosecution of claims against the government. The effect of the former<sup>1</sup> in some of its provisions can only be fully determined by judicial interpretation. Section 1 amends the Act of March 3, 1875;<sup>2</sup> it leaves the original jurisdiction of the Circuit Court as at present, except in raising the value of the matter in dispute, required to give jurisdiction, from \$500 to \$2000, and in making this a requisite in all civil suits, whether the jurisdiction therein is founded on the subject-matter of the controversy or on the citizenship of the parties; and in altering the provision as to suits by assignees of choses in action so as, apparently, to give jurisdiction of them only in cases of foreign bills of exchange, unless the assignor himself could have sued in the Circuit Court. Removal for local prejudice is still allowed in the same cases as formerly, but express provision is made for trying the truth of the affidavit alleging local prejudice; and it is also enacted that if only one of several defendants is entitled to remove the suit on this ground, and if it appears that the rights of the parties will not be impaired by a severance, then the cause shall be remanded to the State court as to all the other defendants. The act also makes the decision of the Circuit Court, that a case has been improperly removed, final, and allows no appeal or writ of error from the order remanding it, thus leaving the party to whatever remedy he may have by writ of error to the highest court of the State. Other sections contain provisions as to receivers appointed by federal courts, and, following the act of July 12, 1882,<sup>3</sup> make national banks suable as citizens of the States in which they are situated. The act closes with a section prohibiting any judge in any court of the United States from appointing any relative, within the degree of first cousin, to an office or duty in the court of which such judge is a member,—a measure suggested by the alleged abuses or improprieties said to exist in some of the Circuit and District Courts.

The act as to bringing suits against the government<sup>4</sup> gives the Court of Claims jurisdiction of all claims against the United States, founded on the Constitution, any act of Congress except for pensions, any regulation of the Executive Department, or any contract, or for damages, in cases not sounding in tort, in respect of which claims redress could be had if the United States were suable, and also of all counter-claims set up by the government; it also gives the District Courts concurrent jurisdiction in cases involving less than \$1000, and the Circuit Courts concurrent jurisdiction in cases involving more than \$1000, but less than \$10,000. Special provision is made for closing up accounts with the government, and detailed regulations are laid down as to conducting the litigation provided for.

The volume of law business done in Washington is very considerable. There are multitudinous claims prosecuted before the departments by attorneys midway between lobbyists and lawyers, and also the business naturally arising in a city of this size and character, of which the courts of the District have jurisdiction. The important work, however, is that before the Supreme Court and the Court of Claims. Practice before the latter is chiefly in the hands of lawyers living in this city; but the same is no longer true in regard to the higher tribunal. Formerly, owing to the difficulty of communication, it was customary for cases brought here on appeal to be put in the hands of men living

<sup>1</sup> Public, No. 159, March 3, 1887.

<sup>2</sup> 18 Stat., 470.

<sup>3</sup> 22 Stat., 162.

<sup>4</sup> Public, No. 145, March 3, 1887.

at the capital, and as a consequence, a comparatively small number conducted nearly all the cases; but the increased facilities for travel have broken down the old order, and now lawyers come on from all parts of the country to argue their cases in person. As a result of this change there are very few men who are to any degree exclusively engaged in practice before the Supreme Court. One such may, indeed, be mentioned,—a man whose name is heard by the public less often than his abilities deserve; this is Hon. John A. Campbell, an ex-justice of the court. Judge Campbell resigned his seat upon the bench during the Civil War, and, like Judge Curtis, returned to practise at the bar. He now appears from time to time as counsel before the tribunal of which he was once a distinguished member, and never without effect. Judge Campbell takes but few cases in the course of a year, and his great talents, together with a habit of shutting himself up and becoming thoroughly saturated with the cause in which he is engaged, enable him to get a thorough grasp of each one to its minutest details. His arguments are masterpieces; indeed, one of them,—that in *New Hampshire v. Louisiana*,<sup>1</sup>—has often been declared to equal any ever made in the court.

D.

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<sup>1</sup> 108 U. S. 76.

## RECENT CASES.

**DURESS—WHO CAN AVOID.**—In an action against a surety on a bail bond duress of the principal cannot be taken advantage of as a ground of defence, no unlawful restraint having been imposed on the surety. *Oak v. Dustin*, 7 Atl. Rep. (Me.) 815.

**MESNE PROFITS — REAL ACTION.**—Where a plaintiff brought suit in ejectment, and asked for mesne profits during defendant's possession, and recovered in the ejectment suit, it was held that the recovery of the profits was based on an implied contract, and not upon the trespass or disseisin, and was, therefore, barred, because the statutory limit as to the former class of actions had expired, though the limit as to the latter class had not. *Seibert v. Baxter*, 12 Pac. Rep. (Kan.) 934.

**FIDUCIARY RELATION.**—It is held in *Dunn v. Dunn*, 7 Atl. Rep. (N. J.) 842, that where an attorney buys from a client a mortgage of which the attorney has had charge, he stands in a fiduciary relation, and must "show affirmatively that the transaction was conducted in perfect good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances and entire freedom of action on the part of the seller;" and unless this is shown the client may have a reassignment.

**RESULTING TRUST TO PAYOR OF CONSIDERATION.**—Where a tenant by curtesy and the heirs of his deceased wife agree that, in order to raise money upon the land, partition proceedings shall be instituted, and that one of the heirs shall buy in the property at the sale, and shall then execute a mortgage of the property, and this is done, receipts from the heirs and the tenants being accepted by the master who made the sale as cash in full payment of the price, a resulting trust arises as to the equity of redemption in favor of the tenant by curtesy and the remaining heirs. *Donlin v. Bradley*, 10 N.-East Rep. (Ill.) 11. This case is in line with the general principles of resulting trusts (Ames Cas. on Trusts, I. 292), the only peculiarity being the method in which the consideration was advanced by the heirs.

**CONDITIONAL SALE — SUBSEQUENT PURCHASER.**—In *Redewill v. Gillen*, 12 Pac. Rep. (N. M.) 872, it was held, in an exhaustive opinion, that when an article is sold on condition that it remains the vendor's property until all the instalments of the price are paid, a purchaser from the vendee, even without notice, can acquire no title whatever. In New York, *Wait v. Green*, deciding in favor of an innocent purchaser, has been virtually overruled by *Ballard v. Burgett*; but the later case of *Comer v. Cunningham* (77 N. Y. 391) seems to have undermined seriously *Ballard v. Burgett*. Illinois and Kentucky are ranged with *Wait v. Green*; but elsewhere, including the U. S. Supreme Court, the weight of authority is to the contrary, and, in deference to it, the court in *Redewill v. Gillen* decided, against their sense of justice, in favor of the plaintiff.

**INJUNCTION — ENFORCING CONTRACT OF EXCLUSIVE SERVICE.**—In *Peperno v. Harmiston* (31 Sol. Journ. 154), where the defendant, who was under an agreement to supply certain horses and performers to a circus, threatened to remove his stock, the court refused an injunction to restrain the removal, on the ground that where specific performance cannot be given, an injunction will not be granted unless damages are an inadequate compensation. This they stated to be the principle of *Lumley v. Wagner*, the leading case (1 DeG., McN., & G. 604). But the decision in that case (by Lord St. Leonards) makes no such distinction, nor does the Vice-Chancellor in the hearing below (5 DeG. & Sm. 485). It is true that the principle is so stated in a leading New York case, *Daly v. Smith* (49 How. Pr. 150), but not in a well-considered decision by Lowell, J., in 1 *Holmes*, 253, nor in the majority of cases (20 *Am. L. Reg.*, N. S. 587).

**SALE — ORDERS OF AGENT.** — Under a statute imposing a fine on any person who, without a license therefor, shall, by sample or procuring orders or otherwise, sell intoxicating liquors, a commercial traveller for a firm in another State, who merely takes an order from a dealer in Connecticut and forwards it to his firm, who deliver it in their State, is guilty of an offence. *State v. Ascher*, 7 Atl. Rep. (Conn.) 822. The ground of the opinion is that "while delivery for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money; yet, for all police purposes, it is competent for the Legislature to say that the acts done by the drummer shall of themselves constitute a sale, and therefore an offence." A minority of two judges, dissenting, held that the drummer's order was not even an executory contract, but merely an offer.

**SURETY — DEBT OF ANOTHER.** — McM. had in his possession funds of uncertain amount belonging to B, and promised M to pay, to the extent of his liability to B, a debt of B to M. The promise was made by accepting verbally an order of B directing McM. to pay M out of the funds in McM.'s hands. It was held that the promise of McM. was not to pay the debt of another, but to pay to M his own debt to B, and therefore not within the Statute of Frauds. *Mitts v. McMorran*, 31 N. W. Rep. (Mich.) 521. The conclusion seems correct, but not the statement that it was a promise to pay his own debt; for (a) a debt must be in a certain amount (Y. B. 12 E. 4, 9, pl. 22; 3 Leon. 161; 30 Alb. L. J. 223); (b) the funds which McM. held were the subject of a bill of account, and not of an action of debt; it was simply a fund in the hands of McM. belonging to B, and therefore could not be a debt.

**STATUTE OF LIMITATIONS — TITLES.** — In *Chapin v. Freeland* (142 Mass. 383) the facts were substantially as follows: A was owner of some counters; B converted them to his own use, and kept them for six years; they were then sold to C, from whom A, the original owner, peaceably retook them. C brings replevin against A. Held, C can recover, because A's right of action against B, and also against C, was barred by the statute, and A cannot put himself in a better position by retaking the goods than he would be in if he had brought an action. *Field, J.*, dissents. The Massachusetts Statute of Limitations bars the remedy, but does not transfer title, and inasmuch as A's title to the goods remained unimpaired, and as he obtained them back peaceably, there is no reason why he should not keep them. Cf. Langdell on Equity Pleading, § 111 *et seq.*

It is difficult to escape the reasoning of *Field, J.* Moreover, at common law A might have brought detinue, for the Statute of Limitations does not run against the action of detinue till six years after a demand made by the original owner. This would seem to be an additional reason why A should be allowed to keep his goods.

**QUASI CONTRACT — ACCIDENTAL BENEFIT.** — The Pacific R. R. Co. sued the U. S. for services done in the way of transportation of passengers and freight, for which the U. S. are indebted to it in the sum of \$136,196.38. The U. S. pleads, as a set-off, the cost of certain bridges built by the U. S. for and at the request of the Company. The question is whether the set-off shall be allowed. In evidence it appeared that during the civil war some of the bridges of the Company were destroyed, partly by the Confederate, and partly by the Union armies. Some of these were rebuilt by the Company, but the bridges in question were constructed by the U. S., to enable them to carry on military operations.

The court held, that under these circumstances, as there was no contract, express or implied, to build these bridges, and as they were constructed only as a military necessity, the U. S. could not charge the Company for them. In an interesting opinion, *Field, J.*, discusses how far the government is liable for property destroyed during the war, and how far the principle applies that private property shall not be taken for public use without compensation.

The point in implied contracts is a nice one. The case is instructive to show that benefit is not the basis of recovery where it is purely accidental, and where the enriching party intended only to benefit himself. *U. S. v. Pacific R. R. Co.*, 7 Supr. Ct. Rep. 490.



**CONTRACT IMPLIED IN FACT—LIABILITY OF SLEEPING CAR COMPANIES FOR THEFTS FROM PASSENGERS.**—In *Lewis v. N. Y. Sleeping Car Co.* (Supreme Court of Massachusetts, Jan. 7, 1887, reported in *Chicago Legal News* of Feb. 12; s. c., *Massachusetts Law Reporter*, Feb. 10), 143 Mass. 267, the court held that the company was liable to a passenger for money stolen from under his pillow while asleep, in the absence of proper care for his protection by the company's officers, and that the fact that two larcenies were committed in that manner was some evidence of such negligence on the part of the company as would render it liable. The action was both in contract and tort. The court considered that the ticket received by the passenger did not express all the terms of the contract entered into. "The contract thereby entered into is implied from the nature and usages of the employment of the company." Knowing that during the night the passenger will be powerless to guard his property, the company invites its passengers to make use of the cars for sleeping. By selling a ticket the company impliedly stipulates to furnish safe and comfortable cars. As to the count in tort, the court say, "The law raises the duty on the part of the car company to afford him this protection" on grounds of public policy.

This case is to be compared with *Whitney v. Pullman's Palace Car Co.*, in the same number of the *Chicago Legal News*, s. c., 143 Mass. 243. The loss in the latter case occurred in the daytime, and the passenger was guilty of contributory negligence. *Held*, that the company was not liable.

The authorities cited in these cases agree that a sleeping car company is not liable either as an inn-keeper or as a common carrier. The courts seem inclined to apply reasons of public policy similar to those which prevailed in case of inn-keepers and carriers to this new kind of bailment. See *Pullman's Car Co. v. Gardner*, 3 Pennypacker, 78, where notice that the company would not be liable for thefts, printed on the berth-check, offered in evidence, was held properly excluded.

**LIBEL ON THE DEAD.**—In *Regina v. Ensor*, Cardiff assizes, February 10, Mr. Justice Stephen held that it was no crime to defame the character of the dead unless the act was done with the intention to injure his surviving family. (*Law Times*, February 19.) The accused had published a defamatory epitaph, which publication caused an assault to be committed by the sons of the deceased. In one count of the indictment it was charged that the act of publication had a tendency to cause a breach of the peace; in another count, that the act was done with an intention to injure the family of the deceased. There being no evidence to support the latter count the court directed a verdict of acquittal. In the opinion it is said, "The dead have no rights and can suffer no wrongs. The living alone can be the subject of protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt, or ridicule." Mr. Justice Stephen points out that a publication attacking the living under the mask of attacking the dead might be a libel, and continues as follows: "It is sometimes said, that, as a man must be held to intend the natural consequences of his acts, and as the natural consequence of the censure of a dead man is to exasperate his living friends and relations, and so to cause breaches of the peace, attacks on the dead must be punishable as libels, because they tend to a breach of the peace, whether they are or are not intended as an indirect way of reflecting on the living, unless, indeed, they are privileged as fair comments on matters of public interest or the like. My brother Wills, in charging the grand jury in this case, seemed to take this view. I have the most unfeigned respect for whatever falls from him, but I cannot agree to this in its full extent." If such were the case, Mr. Justice Stephen suggests, all history is more or less unlawful.

It may be remarked that in *Rex v. Topham*, 4 T. R. 126, the only authority cited in support of this decision, Lord Kenyon called attention to the fact that the indictment did not state that the publication tended to excite a breach of the peace. The view of Mr. Justice Wills is laid down by Lord Coke in 5 Rep. 125 a. An able criticism of the position taken by Mr. Justice Stephen, concluding in favor of Lord Coke's view, is contained in the *Central Law Journal* of March 13.

## REVIEWS.

THE LAW OF CONTRACTS. By J. I. Clark Hare, LL D. Boston : Little, Brown & Co. One volume. 8 vo. Law Sheep. 714 pages.

This book will not satisfy the wants of the case hunter, but to those interested in the study of law as a science it cannot be too highly recommended. Nowhere do we remember to have seen the development of the law of assumpsit so satisfactorily explained as here. That it was originally regarded as an action of tort is well known, but that for acts of omission the promisor was originally held liable as for a deceit practised on the party furnishing the consideration has not been generally known, and for a very clear demonstration of the latter theory we are indebted to Mr. Hare.

*Quare*, however, if, viewing the law of assumpsit as one of contract, the author is not influenced too much by the notion of injury or detriment suffered in fact by the party performing the consideration. For example, in discussing the law of gratuitous bailment, he states, and we think correctly, that the liability of the gratuitous bailee is not a liability for breach of contract, but he gives as reasons: 1. That the bailment is of no benefit to the bailee. 2. That the bailment is not a detriment, but a benefit, to the bailor. But is he not here using the word "detriment" in its popular, rather than in its legal, sense? Regarding detriment as the surrender of a legal right, the difficulty establishing a contract on the part of the gratuitous bailee is to find as a fact that he requested the bailor to exchange the possession of the property for his promise.

We are glad that the author takes occasion to distinctly repudiate the notion that a contract under seal implies a consideration, and states the law as it is, that none is needed. We regret that he has not dealt with the law of negotiable paper in the same way, for the notion that a bill or note delivered as a gift to the payee cannot be enforced by him is modern (see 2 Bl. Com., 446), and at the present day a consideration, as that word is used with reference to a simple promise, is not required in order that the payee of negotiable paper may recover thereon.

Those who have struggled with the phrases "executed and executory considerations" will rejoice that the author has classified contracts as unilateral and bilateral; but we cannot agree with him when he says that, because our law requires a consideration for a promise, the terms are less applicable to the common than to the civil law, for in neither system is the promisee in a unilateral contract ever bound, and in any system of law in a bilateral contract each party is bound. In fact, here, as elsewhere, the author, in distinguishing between the common and the civil law, is inclined, we think, to lay too great stress on the fact that a consideration is required in the one and not in the other. For example, in support of the prevailing view, that a bilateral contract is complete on the mailing of the letter of acceptance, the suggestion is made that this view is correct, for the reason that the question is to be treated as one of performance, and is not to be tested by the rules applicable to promises. At the same time he recognizes that in a bilateral contract each party is bound by a promise, and that the contract is binding because the one promise is the consideration for the other (see page

336), and he admits (see page 360) that the acceptance cannot be effectual as a promise until it reaches the offerer.

As the phrase "implied promise" is used to designate, 1. A class of cases where there is in fact a contract, the promise being established by conduct rather than the language of promise. 2. A class of cases where there is no contract, but where, on principles of enrichment, *i. e.*, to prevent one from unjustly profiting at the expense of another, the law imposes an obligation, and gives the remedy of general assumpsit, — it is to be regretted that one so well acquainted with the distinction did not separate the cases in his treatment of them, and use the phrase *quasi ex contractu* as to the latter.

The want of space prevents our referring at length to the remaining chapters of the book. The author has, however, treated the topics included in those chapters, as he has those to which we have more especially referred, with great care and thoughtfulness, and it is to be hoped that he will increase the obligation which the profession is under to him for his present publication by writing a treatise on those topics of the law of contracts not embraced in the present volume.

W. A. K.

**THE LAW OF TORTS: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law.** By Frederick Pollock. London: Stevens & Sons; Boston: Charles C. Soule. Octavo, ix. and 515 pages.

Mr. Pollock is well known in this country as the editor of the *Law Quarterly Review*, and the author of a treatise on the Principles of Contract. One great merit of the book he has just given us is its brevity and clearness. The principles of the law of torts are here stated in a form easy to read and to understand, and for that reason this work will probably become a favorite with students. The book contains several novel features. Leading American cases are frequently cited in the notes and referred to in the text, and have evidently had weight in the statement of several important principles. The references to the *lex aquilia* are interesting, and justify the author's assertion that this title of the Digest deserves more attention at the hands of English lawyers than it has ever received.

The general scope and object of the work are thus stated in the preface: "The purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts — that this is a true living branch of the Common Law, not a collection of heterogeneous instances." In carrying out this purpose the author has divided his work into two parts, the first being a discussion and review of the general principles common to the whole subject, *viz.*, the grounds of liability, exceptions from liability, and remedies. The second part is devoted to the several distinct kinds of actionable wrongs. In this branch of the subject there is less scope for theory and general discussion than in the first. It is tied down by the old common-law forms of action, and to be complete should include a large amount of historical matter, explaining the origin and use of those forms of action, as well as a statement of the principles now established and acted upon as law. If, for example, some author should show clearly the origin of the action of trover, and trace minutely the successive steps by which it practically swallowed up the

action of detinue, and became a concurrent remedy with trespass *de bonis asportatis*, he could hardly fail to throw light on the difficulties of the existing law of conversion. Mr. Pollock has given no space to historical details, but he has stated the law as it is with accuracy and clearness. The subject of Negligence, for example, usually so confused and voluminous, is well covered in a single chapter of about forty pages.

To a student seeking a general theory of the law of torts, the principle of classification adopted by Mr. Pollock will probably be the most interesting part of the book. One form of its statement, found on page 17, is in these words: "Liability for delict, or civil wrong in the strict sense, is the result either of wilful injury to others, or wanton disregard of what is due to them (*dolus*), or of a failure to observe due care and caution, which has similar though not intended or expected consequences (*culpa*). We have, moreover, apart from the law of trespass, an exceptionally stringent rule in certain cases, where liability is attached to the befalling of harm without proof of either intention or negligence." In other words, all torts may be divided into these three classes: 1. Cases where an actual intention to do harm is necessary. This includes but a very small part of the law of torts at present, though malicious prosecution may be cited as an example. 2. Cases where the actor is liable only for failing to act in the circumstances up to the standard set by the law, that is, the conduct of a prudent man. This covers the great bulk of the law of torts, including the subject of Negligence. 3. Cases where the actor is liable, regardless of intention or negligence, that is, he acts at his peril. The type of this class of cases is *Fletcher v. Rylands*. This division embraces the whole subject, and all torts might be arranged and discussed under these heads, regardless of the forms of action. For example, trespass by entering upon real estate, and conversion by an innocent purchaser from a wrongful possessor, both being cases where a man is liable regardless of intention or negligence, belong, in a strictly scientific arrangement, under the same title with *Fletcher v. Rylands*. Such an arrangement might be a bold step at present, but Mr. Pollock's book will certainly do good service in preparing the way for the final statement and classification of the law of torts in the future.

W. S.

CONSTITUTIONAL PROHIBITIONS. By Henry Campbell Black, of the Williamsport (Pa.) bar. Little, Brown & Co., Boston. 316 pp. 8vo.

This "essay," as the author styles it, is divided into three parts. The first and third treat respectively of the application of that clause of the Constitution of the United States (Art. I., Sect. 10) which prohibits a State from impairing the obligation of contracts, and of the clauses (Art. I., Sects. 9 and 10) which forbid both Congress and the States to pass *ex post facto* laws and bills of attainder. Part II. treats of the way in which the States have dealt with retroactive laws not forbidden by the clauses above mentioned.

The author favors the historical method of treating his subject, and has applied it wherever practicable, *e. g.*, in showing that a State may constitutionally pass insolvent laws. The book is not full of original discussions, or of attempts to show what the law ought to be. To give

a clear statement of the law as it exists seems to be the dominating idea. And this has been very successfully done. If the decisions on any point are in harmony, the principle is given clearly and concisely. If, however, there is a seeming conflict among the cases, every endeavor is made to bring them into line along some general principle, and usually with good results; as, for instance, in formulating the rule that remedies may be changed by State legislatures provided that a substantial remedy is left.

Exceptions may perhaps be taken to certain things in the book, as, for example, to the use of the phrase "executory contracts" in Sect. 22, where it is said that "executory contracts may be cancelled." What is meant is that offers to make a contract or preliminaries to a contract do not bind the State; a statement which is undoubtedly true. But when the contract, even though executory, is once complete, it cannot be impaired by the State. Again, in Sect. 63 it is said that a grant by the State of the privilege of pursuing any business which is against public health and public morals is not a contract, and that a statute revoking the grant is not unconstitutional. What seems the correct explanation of the constitutionality of such a statute is given by the author himself in Sect. 72, where he makes the grant liable to the condition subsequent that the grantor may rescind if the public need requires.

The value of the book lies in its being the first work of any size upon the subject, in its general accuracy of statement, and in its reliable citation of cases. The value is enhanced by a full table of cases cited, and by a good index.

B. E.

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TALKS ABOUT LAW. [A Popular Statement of What Our Law Is and How it is Administered, by Edmund P. Dole. Crown 8vo. 516 pp. Boston and New York, Houghton, Mifflin, & Co. Riverside Press, 1887.]

This is not a law book. Its object is, rather, to take the place of many law books with the general reader, by combining in one work a brief and general statement of the origin and development of the law and of the mode in which it is administered by our courts. Treating of so broad a subject in so narrow a limit, the book must necessarily be unsatisfactory to the lawyer. To the non-professional reader, however, it affords an easy means of acquiring a general and cursory knowledge of the principles of the various branches of the law. It is a question if this object would not have been accomplished in a more satisfactory manner by omitting some of the more unimportant chapters, such as that on Pulpit and Pew, and by utilizing the space thus saved in a more careful explanation of the remaining subjects. The chapters on these side issues, however, such as that on the "Benefit of Clergy," are among the more interesting which the book contains. The repetition of New Hampshire cases and New Hampshire courts gives the work a somewhat local interest, which might well have been avoided in a book for the general reader.

M. C. H.

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THE NATIONAL REPORTER SYSTEM (published by the West Publishing Company, St. Paul, Minn.) has begun the publication of the American Digest, which gives a full and complete digest of the points decided in all the current cases reported in the various publications of

its system. To those who use this system (and the number is large) the digest will be of great value, as it will give references to the respective reporters in which the cases are reported in full. Of little less value will it be to those who, though making no use of the various reporters, nevertheless desire a concise statement of the various points decided by the State Courts of last resort and by the U. S. courts, long before they are incorporated in any regular digest.

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THE STUDENT'S KENT. [By Edward F. Thompson. Boston and N. Y., Houghton, Mifflin, & Co., Riverside Press, 1886. Sm. 8vo. 338 pp.] This little book of 350 pages gives, in a condensed form, the principles as laid down by Kent, with the modifications made since his time. It is as comprehensive as the original, and at the same time is so handy and well indexed that it can be of service to the active lawyer making a hasty search for elementary principles as well as to the young student just entering upon the study of the law.

H. M. W.

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#### BOOKS RECEIVED.

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AN ESSAY ON PROFESSIONAL ETHICS, by Hon. George Sharswood, LL.D. Fifth edition. 8vo. 182 pp. Philadelphia, T. & J. W. Johnson & Co., 1884.

THE PRINCIPLES OF THE LAW RELATING TO THE DISCHARGE OF CONTRACTS, by Robert Ralston, of the Philadelphia bar. 8vo. 60 pp. Philadelphia, T. & J. W. Johnson & Co., 1886.

THE LAW IN SHAKESPEARE, by Cushman K. Davis. St. Paul, West Pub. Co., 1884 (2d ed.). 8vo. 303 pp.

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## A BRIEF SURVEY OF EQUITY JURISDICTION.

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EQUITY jurisdiction is a branch of the law of remedies; and as it affects, or is affected by, nearly the whole of that law, it is impossible to obtain an intelligent view of it as a whole without first taking a brief view of the law of remedies as a whole. Moreover, as all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties.

Absolute rights are of two kinds or classes: First, those rights of property which constitute ownership or dominion, as distinguished from rights in the property of another,—*jura in re aliena*; secondly, personal rights; *i.e.*, those rights which belong to every person as such.

Relative rights, as well as their correlative duties, are called obligations; *i.e.*, we have but one word for both the right and its correlative duty. The creation of every obligation, therefore, is the creation of both a right and a duty, the right being vested in the obligee, and the duty being imposed upon the obligor. Undoubtedly the word "obligation" properly expresses the duty,

and the use of the same word to express the right is a defect of nomenclature which is unfortunate, as it has given rise to much confusion of ideas.

Obligations are either personal or real, according as the duty is imposed upon a person or a thing. An obligation may be imposed upon a person either by his own act, namely, by a contract, or by act of law.<sup>1</sup>

An obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another,—*jura in re aliena*. Instances of real obligations will be found in servitudes or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res*, pignored or hypothecated to secure the payment of a debt, was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of *pawn* or *pledge*. The *hypotheca* has been rejected by our common law,<sup>2</sup> though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law, the very words "lien" and "obligation," having the same meaning and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance.<sup>3</sup>

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<sup>1</sup> Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation.

Strictly, also, a tort gives rise to an obligation as much as a contract; namely, an obligation to repair the tort or to make satisfaction for it; but this is an obligation which the law imposes upon a tort-feasor merely by way of giving a remedy for the tort. In the same way the breach of a contract gives rise to a new obligation to repair or make satisfaction for the breach.

<sup>2</sup> It would, however, be more correct to say that our law does not permit the owner of property to hypothecate it at his own will and pleasure; for hypothecations created by law do exist with us, as will presently be seen.

<sup>3</sup> Such a lien is an hypothecation created by law. It is what civilians call a general hypothecation, because it attaches to all the land of the judgment debtor or recognizor, whether then owned by him or afterwards acquired.

Instances of hypothecations of goods created by law will be found in the lien given to a landlord on the goods of his tenant to secure the payment of rent, and in the lien on beasts *damage feasant*, given to the person injured to secure satisfaction for the injury done. These liens are enforced by distress. The former is in a sense general; *i.e.*, it attaches on all the goods which are on the demised premises when the rent becomes due.



Relative rights differ from absolute rights in this, that the former add nothing to the sum or aggregate of human rights; for what an obligation confers upon the obligee is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights.

Every violation of a right is either a tort or a breach of obligation. Every violation of an absolute right is, therefore, a tort. So is every violation of a right arising from an obligation (*i.e.*, of a relative right) which does not consist of a breach of the obligation. Hence every act committed by any person in violation of a right created by a real obligation is a tort; for such an act cannot be a breach of the obligation.

Whether a right created by a personal obligation can be violated by an act which constitutes a tort, *i.e.*, by an act which does not consist of a breach of the obligation, is a question involved in much doubt and difficulty. In *Lumley v. Gye*,<sup>1</sup> and in *Bowen v. Hall*,<sup>2</sup> this question was decided broadly in the affirmative; for it was held in each of those cases that it was a tort maliciously to procure an obligor to break his obligation. In each of them, however, the Court was divided; in *Lumley v. Gye* there was a very powerful dissenting opinion, which was fully adopted by one of the judges in *Bowen v. Hall*; and, though the writer is not at present prepared to say that the decisions were wrong, yet neither is he prepared to admit that they were right.<sup>3</sup>

An obligation may, however, be so framed as to make it possible for the obligor or a third person to destroy the obligation before the time for its performance arrives. For example, if the performance of an obligation be made conditional upon the happening of an event which is subject to human control, any act which prevents the happening of that event will destroy the obligation; and there can be no doubt that such an act, if done for the purpose of destroying the obligation, will constitute a

<sup>1</sup> 2 El. & Bl. 216.

<sup>2</sup> 6 Q. B. D. 333.

<sup>3</sup> "N. B. Any prevention of the completion of an obligation (*stricto sensu*) caused by a third party would be no violation of a right in the *obligee*, or, if it would, would be a violation of a distinct right. A stranger who employs a builder to undertake an extensive work, or wounds or maims him (thereby, in either case, preventing him from completing a previous contract with myself) violates no right in *me*; and my remedy is against the *builder* for the breach of contract with myself. A stranger who inveigles my servant violates, not my *jus ad rem* under the contract, but my *jus in re*. The servant himself, indeed, does; and for this breach of his obligation (*stricto sensu*) I may sue him on the contract."—*Austin, Jurisprudence* (4th ed.), Vol. 1, p. 402, note

tort. Nor does the writer see any reason to doubt that it would also be a tort maliciously to procure another person to destroy an obligation, even though the person committing the act of destruction were the obligor.<sup>1</sup>

For most practical purposes, however, it may be said with sufficient correctness that a right created by a personal obligation is subject to violation only by a breach of the obligation, and hence only by the obligor; for it will very seldom happen that any question will arise as to the violation of such a right by any person other than the obligor, or in any way other than by a breach of the obligation.

What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a right, neither is there in the violation of that right; for what is a violation of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been violated when by law it has not, it could thus enlarge the right of one man and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common-law judge does; and he is therefore constantly called upon to decide legal questions. It, therefore, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common

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<sup>1</sup> See the observations of Professor Ames, *supra*, page 10.

law refuse to recognize ; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as a violation of a legal right, which courts of common law treat as rightful ; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be ; for the question depends entirely upon the legal effect to be given to the words "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of view is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law ; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership ;<sup>1</sup> and because it is relative, *i.e.*, it cannot exist without a correlative duty ; and it is personal because the duty is imposed upon the person of the owner of the *res* (*i.e.*, of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby render the equitable right more secure and valuable, and yet act consistently with the fact

<sup>1</sup> That is, it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation ; and the only reason why such ownership is not recognized by courts of common law is that the thing itself which is the subject of the ownership (*i.e.*, the equitable obligation), is not recognized by them.

that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person,—*æquitas agit in personam*? One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem*<sup>1</sup> if it would, and that it would not if it could.

The Roman *pignus* and *hypotheca* were rights *in rem*. The *pignus* was admitted into our law because it affected chattels only, and because it could not be effected without delivery of possession; but the *hypotheca* was rejected because it affected

<sup>1</sup> Here again, when it is said that equity cannot create rights *in rem*, reference is had to the *res*, which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res*, there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem* (i.e., an absolute right), as between the obligee and all the rest of the world except the obligor; for it can create a right *in personam* (i.e., a relative right) only as between the obligee and the obligor. To say, therefore, that an obligation can create a relative right *only*, is to say that it can create no right whatever, except as between the obligee and the obligor. Moreover, if an obligation does not create an absolute right, it is impossible to support *Lumley v. Gye* and *Bowen v. Hall*, though the converse does not necessarily follow.

As an equitable obligation creates a right which (in one of its aspects) is absolute, of course it follows that such a right may be the subject of a purchase and sale, or of a new equitable obligation. If, then, the owner of such a right first incur an obligation to hold it for the benefit of A, and afterward sell it to B, who has no notice of the previous obligation to A, will B be bound by the obligation to A? Prof. Ames has clearly

land, and did not require any change of possession.<sup>1</sup> Equity introduced the *hypotheca* without any violation of law, and with the most beneficial effects. Why? Because equity introduced it as a right *in personam* only.

Legal personal obligations may be created without limitation, either in respect to the persons between whom, or the purposes for which, they are created, provided the latter be not illegal. But it is otherwise with equitable obligations; for, as they must be founded originally upon legal rights, so they can be imposed originally only upon persons in whom legal rights are vested, and only in respect of such legal rights; *i.e.*, only for the purpose of imposing upon the obligors in favor of the obligees some duty in respect to such legal rights. But the original creation of equitable obligations is subject to still further limitations, for it is not all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations, are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

What has thus far been said applies to equitable rights as originally created, *i.e.*, to equitable rights which are derived immediately from legal rights; but there are equitable rights which are derived from legal rights only mediately. For, when an

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shown, as the writer thinks, that he will not. (See *supra*, pp. 9-11.) To hold otherwise would be to hold that equity will not afford the same protection to property of its own creation that it does to property not of its own creation; which would be not only absurd in itself, but contrary to the principle that equitable property is governed by the same rules as legal property.

If Prof. Ames's doctrine is correct, it proves the statement in the text, namely, that equity will not create a true, real obligation (*i.e.*, one which will follow the *res* into the hands of a purchaser for value and without notice), even when it has the power to do so; for of course, as between conflicting rights of its own creation, equity may do whatever justice is supposed to require.

<sup>1</sup> See *supra*, page 56, note 3.

equitable right has once been created it may in its turn become the subject of a new equitable right, *i.e.*, its owner may incur an equitable obligation to hold his equitable right for the benefit of some other person; and this process may go on *ad infinitum*, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately. It is to be observed that these equitable rights are created without any alienation or diminution of the rights from which they are derived. For it is not the nature of an obligation, real or personal, legal or equitable, while it remains an obligation merely (that is, while it remains unperformed) to alienate or diminish in any way any right vested in the obligor. In the case, therefore, of a succession of equitable rights derived from one legal right, the legal right remains undiminished in its original owner, and so does each equitable right, and yet the equitable rights add nothing to the sum of human rights,<sup>1</sup> the aggregate of the legal right and all the equitable rights only equalling the legal right. So if the legal right be destroyed (*e.g.*, by the act of God), all the equitable rights will fall to the ground. It is to be further observed that the legal owner is bound only to the original equitable owner, and the latter to the second equitable owner, and so on. If the legal owner and the equitable owners be conceived of as standing in a line, one behind the other, in the reverse order of the time of the creation of their rights, it will be seen that each one in the line is equitably bound to the one immediately before him, and to no one else, and hence that there are as many equitable bonds as there are persons in the line, less one, — the one standing in front being, of course, subject to no bond.

The foregoing method of deriving an indefinite succession of equitable rights from one legal right may be termed the method by sub-obligation.

Another method is for the first equitable obligee to assign his equitable right, at the same time receiving from the assignee a new equitable obligation. He may then assign his new equitable right to a new assignee, at the same time receiving from the latter still another equitable obligation; and this operation may be repeated indefinitely. This method takes place in the common case where

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<sup>1</sup> See *supra*, page 57.

land is mortgaged in the ordinary way to several persons in succession ; for in that case each successive mortgage has a twofold operation, namely, that of an assignment or transfer to the mortgagee, and that of imposing an equitable obligation on the mortgagor in favor of the mortgagee. For example, the first mortgage has the twofold operation of assigning or transferring the land to the mortgagee, and of creating an equitable obligation in the latter to reconvey the land to the mortgagor on payment of the mortgage debt ; and in this way the first or original equitable right is created. Then a second mortgage has the twofold operation of assigning this original equitable right, and of creating in the assignee an equitable obligation to reassign it to the mortgagor on payment of the second mortgage debt. In this way a second equitable right is created, which in its turn may be assigned by a third mortgage, the third mortgagee incurring an equitable obligation to reassign it to the mortgagor on payment of the third mortgage debt ; and this operation will be repeated as often as a new mortgage is given.

If, upon the making of the first mortgage, the mortgagor and the first mortgagee be conceived of as standing one behind the other, the effect of a second mortgage will be to place the second mortgagee between the mortgagor and the first mortgagee, and thus to separate the two latter ; for the second mortgagee, as assignee of the mortgagor, steps into the shoes of the latter as to the first mortgagee, becoming in effect the mortgagor as to the latter, just as if he had purchased the equitable right of the mortgagor (*i.e.*, his equity of redemption), absolutely. As the mortgagor thus ceases to have any relations, for the time being, with the first mortgagee, of course he must give up his place to his successor, the second mortgagee. Still the mortgagor does not stand aside as a mere stranger, as he would do if he had simply sold his equity of redemption ; but he takes his place next to the second mortgagee by virtue of the new equitable obligation (*i.e.*, equity of redemption) running from the latter to him. For the same reasons a third mortgagee will take his place between the mortgagor and the second mortgagee, and so on. Therefore, the mortgagor will always be at one end of the line, and the first mortgagee at the other end, the latter always remaining stationary, but the former moving, as often as a new mortgage is given, to make room for the new mortgagee.

A question, however, still remains, namely, is the first mortgagee to be placed in front, with the several other mortgagees, and the mortgagor behind him in the order of time, or is the mortgagor to be placed in front with the several mortgagees behind him in the reverse order of time? The answer depends upon whether the mortgagees and the mortgagor are to be placed with reference to the operations of the mortgages as transfers or assignments, or with reference to their operation as creating equitable obligations. If the former, the first mortgagee should stand in front; if the latter, the mortgagor should stand in front. And, as we are now considering mortgages, with reference to their operation in creating equitable obligations, it is clear that the mortgagor and the mortgagees should be placed with reference to that operation. Thus, we have the same final result, whether a succession of equitable obligations be created by successive mortgages, or by successive sub-obligations, though this result is produced by different machinery. In both cases there are as many equitable obligations as there are persons in the line, less one. In both cases every person in the line, except the first and the last, is both an equitable obligor and an equitable obligee, the first being an equitable obligee only, and the last an equitable obligor only. The only differences are, first, that, in the case of successive mortgages, each successive equitable obligation is made the subject of a new equitable obligation (*i.e.*, of a sub-obligation), not by the original obligee, but by his assignee; and, secondly, that all the successive equitable obligations are made in favor of the same person, namely, the mortgagor, the latter always acquiring a new equitable obligation the moment that he relinquishes an old one.

There are still other modes in which an indefinite number of equitable rights may be derived from one legal right, namely: first, the owner of the legal right, instead of incurring one equitable obligation as to the whole of the legal right, may incur an indefinite number of equitable obligations, each as to some aliquot part of the legal right; secondly, the owner of the original equitable right may assign that right to an indefinite number of persons by assigning some aliquot part of it to each.

With respect to the modes in which they are created, equitable obligations differ widely from legal obligations. Most legal obligations are created by means of contracts; *i.e.*, a person promises (expressly or by implication), or covenants to do or not to do



something, and the law annexes to the promise or covenant an obligation to do, or refrain from doing, according to the terms of the promise or covenant. But a purely equitable obligation cannot be made in that way. I say "a purely equitable obligation," because an obligation is frequently annexed to a promise or covenant both by law and by equity, *i. e.*, the law annexes a legal obligation, and equity annexes an equitable obligation. But equity cannot annex an obligation to a promise or covenant to which the law refuses to annex any obligation.<sup>1</sup> In a word, there is properly no such thing as an equitable promise or covenant, and no such thing as an equitable contract. The reason, therefore, why a contract cannot result in creating a purely equitable obligation is, that a contract always results in creating a legal obligation.

How, then, are purely equitable obligations created? For the most part, either by the acts of third persons or by equity alone. But how can one person impose an obligation upon another. By giving property to the latter on the terms of his assuming an obligation in respect to it. At law there are only two means by which the object of the donor could be at all accomplished, consistently with the entire ownership of the property passing to the donee, namely: first, by imposing a real obligation upon the property; secondly, by subjecting the title of the donee to a condition subsequent. The first of these the law does not permit; the second is entirely inadequate. Equity, however, can secure most of the objects of the donor, and yet avoid the mischiefs of real obligations, by imposing upon the donee (and upon all persons to whom the property shall afterwards come without value or with notice) a personal obligation with respect to the property; and accordingly this is what equity does. It is in this way that all trusts are created, and all equitable charges made (*i. e.*, equitable hypothecations or liens created) by testators in their wills. In this way, also, most trusts are created by acts *inter vivos*, except in those cases in which the trustee incurs a legal as well as an equitable obligation. In short, as property is the subject of every equitable obligation, so the owner of property is the only person whose act or acts can be the means of creating an obligation in respect to that property. Moreover, the owner of property can

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<sup>1</sup> See *supra*, page 58.

create an obligation in respect to it in only two ways: first, by incurring the obligation himself, in which case he commonly also incurs a legal obligation; secondly, by imposing the obligation upon some third person; and this he does in the way just explained.

But suppose a person, to whom property is given on the terms of his incurring an equitable obligation in respect to it, is unwilling to incur such obligation, shall it be imposed upon him against his will? Certainly not, if he employs the proper means for preventing it; but the only sure means of preventing it is by refusing to accept the property, *i. e.*, to become the owner of it; for no person can be compelled to become the owner of property even by way of gift. If he once accept the property, the equitable obligation necessarily arises, and he can get rid of the latter only by procuring some one else to accept the property with the obligation; and even this he cannot do without the sanction of a court of equity.

An owner of property may, however, incur an equitable obligation in respect to it, founded upon his own act and intention, and yet make no contract, nor incur any legal obligation. For example, if an owner of property do an act with the intention of transferring the property, but which fails to accomplish its object because some other act is omitted to be done which the law makes necessary, equity will give effect to the intention by imposing an equitable obligation to do the further act which is necessary to effect the transfer, provided a valuable consideration was paid for the act already done, so that the transfer, when made, will be a transfer for value, and not a voluntary transfer. So, if an owner of property, thinking that he has the power to hypothecate it merely by declaring his will to that effect, declare, for a valuable consideration, that such property shall be a security to a creditor for the payment of his debt, though he will not create a legal hypothecation, nor incur any legal obligation, yet he will create an equitable hypothecation or an equitable lien; *i. e.*, equity will give effect to the intention by creating an equitable obligation to hold the property as if it were legally bound for the payment of the debt. In both the cases just put, equity proceeds upon the principle that the act already done would be effective for the accomplishment of its object in the absence of any positive rule of law to the contrary; and in both cases equity gives effect to the inten-

tion without any violation of law ; for, in the first case, equity compels a performance of every act which the law requires, while, in the second case, equity merely creates a personal obligation which violates no law, in lieu of a real obligation, which the law refuses to create.

Many equitable obligations are created and imposed by equity alone ; and this is done upon the principle that justice can thereby be best promoted. For example, it is by force of equity alone that an equitable obligation follows the property which is the subject of the obligation until such property reaches a purchaser for value and without notice. The obligation may have been created originally through the act or acts of the owner of the property ; but it is by force of equity alone that this obligation is imposed upon subsequent owners of the property who had no part in its original creation. So also all that large class of equitable obligations commonly known as constructive trusts are created by equity alone. For example, where property is obtained by fraud, unless (as seldom happens) the fraud be of such a nature as to prevent the legal title from passing, the only legal remedy will be an action for damages against the party committing the fraud ; but equity, by creating an equitable obligation, can and will follow the property itself (until it comes into the hands of a purchaser for value and without notice), and compel a specific restoration of it. If it be asked why a legal obligation to restore the property is not created, and how equity can go beyond the law, the answer is that the right is created in such a case merely for the sake of the remedy, and that the common law never contemplates any remedies other than those which the common law itself affords. The common law does not, therefore, create an obligation to restore the property, because it would regard such an obligation as useless. It could only give damages for a breach of the obligation ; and it can equally well give damages for the fraud itself. Moreover, the equitable obligation is generally conditional upon the restoration by the person defrauded of the consideration received by him, and courts of common law have no adequate machinery for dealing with conditions of such a nature.

Another large class of equitable obligations created by equity alone are those (already referred to) imposed upon mortgagees in favor of mortgagors. A mortgage is a transfer of property, either defeasible by a condition subsequent, namely, by the payment of

the mortgage debt on a day named, or accompanied by an agreement to reconvey the property upon a condition precedent, namely, the payment of the mortgage debt on a day named. In either case, if the mortgagor suffer the day to pass without performing the condition, his right to have the property restored to him is entirely and absolutely gone at law; and it is at the very moment that the mortgagor loses his legal right that his equitable right arises, namely, to have the property reconveyed to him (notwithstanding his failure to perform the condition agreed upon), on payment of the mortgage debt, interest, and costs. But how is it that equity can create such an obligation, it being not only without any warrant in law, but directly against the express agreement of the parties? Because, while the mortgagor has lost his right to the land, the mortgage debt remains wholly unpaid; and consequently the mortgagee can at law keep the land, and yet compel the mortgagor to pay the mortgage debt. In a word, the mortgagor loses (*i.e.*, forfeits) his land merely by way of penalty for not performing the condition; and though this is by the express agreement of the parties, yet equity says the only legitimate object of the penalty was to secure performance of the condition; and, therefore, it is unconscionable for the mortgagee to enforce the penalty, provided he can be fully indemnified for the breach of the condition; and, the condition being merely for the payment of money, the mortgagee will, in legal contemplation, be fully indemnified for its breach by the payment of the mortgage debt (though after the day agreed upon) with interest and costs. In short, equity creates the equitable obligation in question upon the ancient and acknowledged principle of relieving against penalties and forfeitures.

Still another important class of equitable obligations created by equity alone are those commonly known as rights of subrogation. For example, a debtor becomes personally bound to his creditor for the payment of the debt, and also pledges his property to the creditor for the same purpose. A third person also becomes personally bound to the creditor for the payment of the same debt as surety for the debtor, and pledges *his* property to the creditor for the same purpose. In this state of things justice clearly requires that the debt be thrown upon the debtor, or upon the pledge belonging to him, and that the surety and the pledge belonging to him be exonerated from the debt, provided this can

be done without interfering with the rights of the creditor. The latter, however, has the right to enforce payment of his debt in whatever way he thinks easiest and best, *i. e.*, in whatever way he chooses; and equity cannot prevent the exercise of that right without a violation of law. If, then, the surety or his property should be compelled to pay the debt, the legal consequences would be, first, that the debt would be gone, and the debtor's personal obligation to the creditor extinguished, for payment by the surety or by his property has the same legal effect as payment by the debtor or by his property; secondly, that, the *personal* obligation of the debtor being extinguished, the *real* obligation of his property would be extinguished also, for the latter is only accessory to the former, and hence it cannot exist without it. Moreover, other legal consequences to the surety would be, first, that the surety would lose the benefit of any legal priority that the creditor might have had over other creditors of the same debtor; secondly, that the surety would have no means of obtaining indemnity from the debtor unless he could prove a contract by the latter (either express or implied in fact) to indemnify him. But here equity employs a useful fiction in aid of the surety; for it treats the latter as having (not paid, but) purchased the debt. Hence, it treats the debt as still subsisting in equity until it is paid by the debtor or by his property. In other words, payment by the surety or by his property does not extinguish any of the rights of the creditor in equity, though it does at law; and yet, after payment by the surety or by his property, the creditor holds his rights, not for his own benefit, but for the benefit of the surety. This, therefore, is an instance in which equity creates one equitable right (namely, in the creditor), in order to make it the subject of another equitable right (namely, in favor of the surety).

There are other cases in which the object of subrogation is to obtain not exoneration, but contribution, namely, where there are several persons who ought in justice to contribute equally towards the discharge of a debt or other burden. Such is the case when there are several co-sureties for an insolvent debtor, or when several persons incur a debt jointly.

There is a class of cases in which the doctrine of subrogation seems to have been unwarrantably extended under the name of marshalling. For example, if the owner of houses A and B

(worth, respectively, \$10,000 and \$5,000) mortgage them both to C for \$5,000, and then mortgage A to D for \$10,000, and then become insolvent, it is said that D may throw the whole of C's mortgage on B, and thus obtain payment in full of his own mortgage out of A, though the consequence be that unsecured creditors of the insolvent will receive nothing; and the principle upon which this is held is generalized by saying that when one of two creditors has the security of two funds, and the other has the security of only one of those funds, the latter creditor may throw the debt of the former creditor wholly upon the fund which is not common to both (provided, of course, that fund be sufficient to pay it), in order that he may obtain payment of his own debt out of the fund which is common to both. This doctrine had its origin in efforts of courts of equity to prevent the harsh and unjust discriminations which the law formerly made between creditors of persons deceased, whose claims were in equity and justice equal; and it seems that the doctrine, as a general one, cannot be sustained upon any principle. For example, in the case just supposed, the doctrine of marshalling assumes that, in equity and justice, house B ought to exonerate house A from the first mortgage, whereas, in truth, they ought to bear the burden of the first mortgage equally. As between secured and unsecured creditors, equity clearly ought to favor the latter class, if either.

Lastly, still another instance of an equitable obligation created by equity alone, is the equitable hypothecation or lien given to a vendor, upon land which he has sold and conveyed, to secure the payment of the purchase-money.

Reference has been already made to cases in which a contract results in an equitable as well as a legal obligation. Why is this? Because the legal obligation is not sufficient for all the purposes of justice. In what contracts, then, do the purposes of justice require an equitable as well as a legal obligation? Chiefly in those which consist in giving (*dando*) instead of doing (*faciendo*). What are the defects in the legal obligation annexed to such contracts? Chiefly these: First, although an obligation to give a thing is said to confer on the obligee a right to the thing, a *jus ad rem*, yet this right can be enforced only against the obligor personally. A consequence of this is, that, if the obligor become insolvent after receiving the price of the thing, but before the thing

is actually given to the obligee, both the thing itself and its price will go to the creditors of the insolvent. Of course justice requires that, the obligor having obtained the price of the thing, the obligee should obtain the thing itself; and this an equitable obligation enables him to do. Secondly, a legal obligation can never be enforced against any person other than the obligor or his personal representative. If, therefore, the owner of a *res* who has incurred a legal obligation to give it to A, choose to give it to B, or if he die, and the *res*, being land, descends to his heir, it will be impossible for A to obtain any relief except damages, however inadequate such relief may be. But if an equitable obligation has also been incurred, it will be possible for A to obtain the *res* itself, notwithstanding the death of the obligor, and also notwithstanding the transfer of the *res* to B, unless the latter be a purchaser for value and without notice. Thirdly, a legal obligation creates a right (*i.e.*, a relative right) in the obligee alone, and this right must remain in the obligee until his death, unless it be previously assigned either by his own act or by act of law; and upon the death of the obligee, the right must vest in his personal representative. When, therefore, a contract is made with A to give a thing to B, it seems impossible to enforce the contract effectively by virtue of the legal obligation annexed to it; for it can be enforced by A alone, and he can recover no more than nominal damages. Equity will, however, annex to such a contract an obligation directly to B; and hence the latter can obtain in equity without difficulty, the benefit intended to be secured to him by the contract. So, if a legal obligation be incurred to convey land to the obligee, and the latter die before the land is conveyed, the sole right to enforce the obligation will go to the personal representative of the obligee; and yet, clearly the heir ought to have the land, though the personal representative ought to pay for it; for such would have been the effect of the performance of the obligation but for the accident of the death of the obligee. To meet this difficulty, therefore, equity will create an equitable right in the obligee, which, upon the death of the latter, will go to his heir.

Having thus treated with sufficient fulness of equitable rights, it remains to speak briefly of the violation of such rights. In respect to their violation, equitable obligations are subject to nearly the same observations as legal obligations. Equitable obligations are, however, more subject to violation by tortious

acts than are legal obligations; for, as an equitable obligation always has some legal or equitable right for its subject, any tortious injury to, or destruction of, this latter right, or any wrongful transfer of it, will, it seems, be a tort to the equitable obligee. Thus, a trespass committed upon land or upon a chattel which is the subject of an equitable obligation, is, it seems, a tort to the equitable obligee, though, as it is also a tort to the legal owner, and as the equitable obligee can, as a rule, obtain redress only through the legal owner, the tort to the equitable obligee seldom attracts attention. So it seems that any wrongful extinguishment by the obligee of an obligation which is itself the subject of an equitable obligation, though it is a breach of the equitable obligation, is also a tort to the equitable obligee. So it seems that the alienation by its owner of any right which is the subject of an equitable obligation, in disregard of such obligation, is a tort to the equitable obligee.

This completes what it was proposed to say upon the subject of rights and their violation, and the way is thus prepared to treat of remedies.

*C. C. Langdell.*

[*To be continued.*]



## LEGAL TENDER.

THE question whether Congress has the power to make paper a good tender in payment of debts, and the question whether under any given circumstances it is wise or right that Congress should use it, are very different things. He who asserts the power may well enough deny the wisdom, the justice, or the morality of any particular instance of its exercise; recalling what Sir Matthew Hale said of the king's prerogative regarding the coin: "It is true that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonor to the nation if it should . . . but surely if we respect the right of the thing, it is within the king's power to do it."<sup>1</sup> The topic which it is now proposed to consider is the purely legal one of constitutional power.

I. As regards the clauses of the Constitution relating to money, and as to the opinion of the framers of it about the emission of bills and making paper a legal tender.

The specifications of the power which is given to the Congress of the United States in the Constitution, relating to money, are two: power is given to borrow money and to coin money. Art. I., Sect. 8, clause 2, reads: [The Congress shall have power] "to borrow money on the credit of the United States." In clause 5 the power is given "to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures." Provisions corresponding to these are found in Art. 9, Sects. 4 and 5, of the Articles of Confederation; and the language there used accounts in part for that of the Constitution. The clauses above quoted originally stood, in Pinckney's Plan of a Federal Constitution,<sup>2</sup> as follows: "The Legislature of the United States shall have the power to borrow money and emit bills of credit; . . . to coin money, and regulate the value of all coins, and fix the standard of weights and measures." The Plan was referred to a committee. In the draft of the Constitution reported by the committee of detail<sup>3</sup> on August 6, after more than two months, the first clause stood nearly as before, while the other one read thus: "to coin money, to regulate the value of foreign coin."

<sup>1</sup> 1 Hale, P. C. 193.

<sup>2</sup> 5 Elliott's Debates, 130.

<sup>3</sup> *Ib.* 378.

There was now no difficulty in regard to the clause about coining money; it passed without opposition, taking on at some later stage the shape in which it now stands, namely, that which is first quoted above. As regards the other clause, that part of it was stricken out which authorized Congress to emit bills, and it was left thus: "to borrow money on the credit of the United States." In the articles of Confederation it had been: "to borrow money or emit bills on the credit of the United States;" and now, in the final result, they merely struck out, "or emit bills."

At no time did any plan or draft of the Constitution contain anything which in express terms touched the making of bills by Congress a legal tender; nothing was said for or against that power. That omission was not, of course, because the subject was unfamiliar; it was, in fact, very much brought to the attention of the framers of the Constitution, and so were all the possibilities of legislative action about it. It was suggested by Madison that this power of emitting bills of credit should not be struck out, but that the making of such bills a legal tender should be prohibited. It was suggested by others that if there were merely a striking out and no prohibition, the power both to emit bills and to make them a legal tender would exist in Congress. But still no prohibition was inserted, and there was simply a striking out of the express authority to emit bills.<sup>1</sup>

Now, as regards the States. In Pinckney's Plan, Art. XI,<sup>2</sup> they were forbidden, "without the consent of the Legislature of the United States. . . . [to] emit bills of credit, [or] make anything but gold, silver, or copper a tender in payment of debts." By the report of the committee of detail<sup>3</sup> they were forbidden absolutely to coin money; and the previous prohibition, "without the consent of the Legislature of the United States," was continued as to the clause about emitting bills of credit, or making anything but specie a tender in payment of debts. This condition was afterwards stricken out,<sup>4</sup> and the whole provision on the subject as regards the States, finally took its present form of an absolute prohibition.<sup>5</sup>

<sup>1</sup> *Ib.* 434.

<sup>2</sup> *Ib.* 131.

<sup>3</sup> *Ib.* 381.

<sup>4</sup> *Ib.* 484, 485.

<sup>5</sup> Const. U. S., Art. I., Sect. 10, clause 1: "No State shall . . . coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." What was meant by emitting bills of credit was afterwards a matter of controversy in the courts. The definition of "bills of credit" by the Supreme Court (by the majority, per Marshall, C. J.) in *Craig v. Mo.*, 4 Pet. 432 (1830), included any paper

As things stood, therefore, when the instrument was launched, and as they stand now; *first*, both the Union and the States could borrow money; *second*, the States could not coin money, and they could not give the quality of "a tender in payment of debts" to anything but gold and silver coin; *third*, the Union could "coin money, regulate the value thereof, and of foreign coin." It was not restricted as to the metal it should coin. It was not given any express power to give or to withhold from its own coin or any other, the quality of a legal tender in payment of debts; and it was not denied any usual or naturally implied power of this sort; *fourth*, the States could not emit bills, and, of course, they could not borrow by the aid of such bills; *fifth*, as to the power of Congress to emit bills, to supply a paper currency, or to make it a legal tender, the Constitution was silent.

The questions present themselves, Can Congress emit bills? Can it make them a legal tender? Can it make anything else a legal tender? In answer to the last of these questions, all agree that Congress can make coin a legal tender,—any coin. It is not restricted to its own coin; and it is not restricted to gold and silver. The power to do this is fairly, although not necessarily, implied in that of coining and regulating the value of coin. In view of the silence of the Constitution, the usual functions of coined money, and the usual powers of a government in regard to it, such a power cannot for a moment be doubted.

Can Congress emit bills and make them a legal tender? In considering the action of the Convention which framed the Constitution it is interesting to observe that this question presented itself, for the most part, not as a twofold question, but as a single one. The matter discussed was the emission of bills. Whatever this might mean, this was the dangerous thing. This was the power which it was proposed, in terms, to give, and this only; and this only is what was stricken out. If it should turn out that the power of emitting bills was not gone, by merely striking out the grant, then, of course, that act is not conclusive upon the question of giving them the legal tender quality. This power of making paper a legal tender may, indeed, be wanting for other reasons,

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medium issued by a State for the purposes of common circulation. But this was afterwards restricted to bills issued by the State, and "containing a pledge of its credit." *Briscoe v. Bk. of Ky.*, 11 Pet. 257 (1837); *Darrington v. Alabama*, 13 How. 12 (1851). This change saved the State banks.

but it is not wanting by reason merely of striking out the expression of a power to emit bills.

Let us see just what took place in the Convention as regards bills of credit, and what was then thought to be the effect of its action. What actually took place may be seen (so far as we have any report of it) by looking at pages 434 and 435 of the fifth volume of Elliott's Debates. The Convention was discussing, on August 16, the draft of a Constitution submitted ten days before by the Committee of Detail:—

Mr. GOUVERNEUR MORRIS moved to strike out "and emit bills on the credit of the United States." If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.—Mr. BUTLER seconds the motion.—Mr. MADISON. Will it not be sufficient to prohibit the making them a *tender*? This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may in some emergencies be best.—Mr. GOUVERNEUR MORRIS. Striking out the words will leave room still for notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interest will oppose the plan of government, if paper emissions be not prohibited.—Mr. GORHAM was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure.—Mr. MASON had doubts on the subject. Congress, he thought, would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on, had such a prohibition existed.—Mr. GORHAM. The power, as far as it will be necessary or safe, is involved in that of borrowing.—Mr. MERCER was a friend to paper money, though, in the present state and temper of America, he should neither propose nor approve of such a measure. He was, consequently, opposed to a prohibition of it altogether. It will stamp suspicion on the government, to deny it a discretion on this point. It was impolitic, also, to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.—Mr. ELLSWORTH thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.—Mr. RANDOLPH, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.—Mr. WILSON: It will have a most salutary influence on the credit of the United States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered;

and as long as it can be resorted to it will be a bar to other resources. — Mr. BUTLER remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power. — Mr. MASON was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed, on the other side, that there was none in which the government was restrained on this head. — Mr. READ thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation. — Mr. LANGDON had rather reject the whole plan than retain the three words, “and emit bills.”

Morris's motion to strike out was then carried by a vote of nine States to two. In a note at the bottom of page 435, in accounting for the vote of Virginia, Madison says: “This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that the striking out of the words would not disable the government from the use of public notes so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts.”

Now, in regard to that discussion, observe one or two points: *first*, that the objectionable thing was not merely making paper a legal tender, but having a paper currency at all. Madison's suggestion to insert a prohibition upon making bills a legal tender, was met by saying that all paper emissions must be prohibited; and Madison's note shows that he conceived that, in their final action, they were cutting away all pretext for a paper currency, and not merely for making it a legal tender; *second*, eleven persons only are reported as speaking in this discussion out of fifty-five, who, at one time or another, attended the Convention; <sup>1</sup> and most of those who spoke appear to have assumed that striking out the phrase “emit bills on the credit of the United States” was equivalent to prohibition.<sup>2</sup> But, although most of the members may have assumed this, all of them did not. One prominent and respected member, Mr. Gorham, from Massachusetts, distinctly made the point that, while he favored striking out, he would not consent to prohibition; he would strike out, because leaving the words in would be a standing temptation to use the power. Madison also tells us, in explaining his vote, that he thought there would still be some power

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<sup>1</sup> 1 Ell. Deb. 125.

<sup>2</sup> And so Luther Martin, in his Address to the Legislature of Maryland, 1 Ell. Deb. 369, 370.

of using "public notes." Of these eleven speakers, five, viz.: Madison, Mason, Gorham, Mercer, and Randolph expressed themselves as not in favor of wholly prohibiting the emission of bills. And so, in accounting for the large vote in favor of Morris's motion, it is reasonable to suppose that a considerable number shared the opinion of Gorham, that striking out was not equivalent to prohibition. This sagacious policy of silence, rather than positive grant or positive prohibition, as regards the powers and duty of the Union, was resorted to on several occasions; they wished, as Gouverneur Morris is reported to have said of the instrument which they were preparing,<sup>1</sup> to "make it as palatable as possible." For example, on an unsuccessful motion to strike out a clause making the compensation of members of Congress payable out of the National treasury, Massachusetts voted to strike out; "not," says Madison, "because they thought the State treasury ought to be substituted, but because they thought nothing should be said on the subject, in which case it would silently devolve on the National Treasury to support the National Legislature." The members of the Convention were sensible that the Constitution, as Madison said, "had many obstacles to encounter," and they preferred sometimes to leave the instrument silent rather than to invite opposition by express provisions, either one way or the other.<sup>2</sup>

Such was the action of the framers of the Constitution as to the power to emit bills and the closely related topic of making them a legal tender. Turn now and consider that it is the established law of the country that Congress may emit bills. There is no doubt about that. It has been practised for seventy years and more; and Chief Justice Chase, in delivering the opinion of the Supreme Court of the United States, in *Veazie Bank v. Fenno*,<sup>3</sup> says: "It

<sup>1</sup> 4 Ell. Deb. 611.

<sup>2</sup> Compare the striking out of a clause empowering Congress to grant charters of incorporation, a power which, nevertheless, it has, 5 Ell. Deb. 543, 544; and Jefferson's comments, 4 *ib.* 610; and the note, *ib.* 611; and see Legal Tender Cases, 12 Wall. 559, per Bradley, J. Compare also the fate of Mr. Gerry's motion ("he was not seconded") to extend to Congress the prohibition which was put upon the States, as to impairing the obligation of contracts, 5 Ell. Deb. 546; see the remarks of Morris, *ib.* 485. Compare also the language of Madison, in his letter of Feb. 22, 1831, to C. J. Ingersoll; a certain evil which he is there discussing was not, he says, foreseen, "and, if it had been apprehended, it is questionable whether the Constitution of the United States (which had many obstacles to encounter) would have ventured to guard against it by an additional provision." 4 Ell. Deb. 608.

<sup>3</sup> 8 Wall. 533, at p. 548.

cannot be doubted that, under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. "It is not important here," he adds, "to decide whether the quality of legal tender in payment of debts can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use, by those who see fit to use them, in all the transactions of commerce; to provide for their redemption; to make them a currency uniform in value and description, and convenient and useful for circulation. . . . Congress has undertaken to supply a currency for the entire country. . . . It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may properly be described as bills of credit. . . . Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. . . . Congress may restrain by suitable enactments the circulation as money of any notes not issued under its own authority." The two dissenting Judges do not deny the power of the government to emit bills of credit, but they speak of them as being "issued under a constructive power to issue bills of credit, as no express power is given in the Constitution."<sup>1</sup> And again, in the case of *Hepburn v. Griswold*,<sup>2</sup> Chase, C. J., says: "No one questions the general constitutionality . . . of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of preëxisting debts."

We are, therefore, to remark, that while the doctrine is now established that Congress may emit bills of credit, may furnish a paper currency, and may prohibit the circulation of any currency but its own, yet, in the debates of the Convention, so far as we know anything about them, the majority of the speakers thought that they were prohibiting bills of credit and paper money. They were wrong. They talked as if the striking out of the words "and emit bills on the credit of the United States" were prohibition;

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<sup>1</sup> 8 Wall., at p. 555.

<sup>2</sup> *Id.* 603, at p. 619.

but it was not. Mr. Gorham's view is now the accepted one; the striking out was the removal of an express grant of power, but it was not a prohibition of the power. It had the effect to leave the question of power to be settled as it might arise, as in the instance of striking out the grant of power to grant charters of incorporations.<sup>1</sup> And so as regards the further question of the power to make the currency a legal tender, this act of striking out the words "and emit bills on the credit of the United States" was merely neutral. We have seen that most of those who took part in the debates of the Convention appear to have thought that if the power of emitting bills of credit should exist at all, the power to make them a legal tender would also exist if it were not expressly prohibited. Although Madison seems to have conceived that dropping the power to emit bills would not wholly deprive the Union of that power, while it would leave it destitute of the power to make its issues a tender, yet, as Mr. Justice Gray remarks,<sup>2</sup> "he has not explained why" he thought so. He also thought that there would be no power to issue them as a currency, or to establish any paper currency; which is not so. And he thought, too, that forbidding the issuing of bills of credit to the States was only forbidding such as are made a legal tender,<sup>3</sup> which was not so. "The Constitution itself," said Marshall, C. J., in *Craig v. The State of Missouri*,<sup>4</sup> furnishes no countenance to this distinction. The prohibition [in the case of the States] is general. It extends to all bills of credit, not to bills of a particular description."

II. But while it is true that no argument can be drawn from the action of the Convention in dealing with the power of Congress to emit bills of credit, against its power to give the quality of legal tender to its paper currency, yet it may, of course, be true for other reasons that Congress has no such power. This was strongly declared by Mr. Webster, in his speech on the "Specie Circular," delivered in the Senate of the United States on the 21st of December, 1836. The debate related to an order of the Secretary of the Treasury to certain officials to require the payment of gold and silver for public lands. Mr. Webster said:<sup>5</sup> "What is meant by the 'constitutional currency' about which so much is said? What

<sup>1</sup> See also the express proviso of Art. IV. Sect. 3, as to the Territories.

<sup>2</sup> 110 U. S. at p. 443.

<sup>3</sup> Letter to C. J. Ingersoll, Feb. 22, 1831, 4 Ell. Deb. 608.

<sup>4</sup> 4 Pet. 410, at p. 434.

<sup>5</sup> Webster's Works, IV. 270, 271.



species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by *currency*. Currency, in a large, and, perhaps, in a just sense, includes not only gold, and silver, and bank notes, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the *legal money* of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender, in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender, in payment of debts, and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it, in this respect, but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts. Congress has exercised this power, fully, in both its branches. It has coined money, and still coins it. It has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it, would shake the whole system. But, if the Constitution knows only gold and silver as a legal tender, does it follow that the Constitution cannot tolerate the voluntary circulation of bank notes, convertible into gold and silver at the will of the holder, as part of the actual money of the country? Is a man not only to be entitled to demand gold and silver for every debt, but is he, or should he be, obliged to demand it in all cases? Is it, or should government make it, unlawful to receive pay in anything else? Such a notion is too absurd to be seriously treated. The constitutional *tender* is the thing to be preserved, and it ought to be preserved sacredly, under all circumstances. The rest remains for judicious legislation by those who have competent authority."

That is a very emphatic expression of opinion on the part of Mr. Webster, and it is often cited. He puts this doctrine as

resulting from the fact that Congress, while not expressly prohibited, like the States, yet has no grant of power "in this respect, but to coin money and regulate the value of foreign coins."<sup>1</sup> If this ground be thought, as I venture to think it, not a very strong one, it must be remembered that Mr. Webster was not, just then, concerned in any careful or affirmative discussion of this topic; he was only making a passing concession to his opponents. His line of thought was this: "You talk of 'paper money' as unconstitutional; and of gold and silver as the only 'constitutional currency.' What is meant by 'constitutional currency?' If you mean that nothing but coin can be a legal tender, I agree; but if you mean that it is not constitutional to have a paper currency at all, I deny it." That is to say, he conceded a point, in passing, without at all undertaking to weigh carefully his language or his reasons as regards a matter upon which he assumes that all whom he is addressing think alike. Still he does give a reason; (*a*) there can be no legal tender but coin, as resulting from the action of a State, because the States are expressly prohibited from making anything but gold and silver a tender in payment of debts; (*b*) there can be no legal tender but coin resulting from the action of Congress, because, though not expressly prohibited, "as Congress has no power granted to it in this respect, but to coin money and regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin, as a tender in payment of debts and in discharge of contracts."

Now, as regards these statements of Mr. Webster, there is, in the first place, no difficulty in assenting to what he says about the power of the States. But as regards Congress, his conclusion is by no means so obvious. When it is said that Congress has no other power granted to it, in respect to legal tender, than that which is mentioned, if it is meant that no such power is granted by implication elsewhere, there is a begging of the question which we are discussing, and of which more will be said later on. If it is meant that there is no other express grant of the power, the statement is objectionable in its assumption that there is here any express grant of power to establish a legal tender; although it is to be admitted that there is not any express grant of it elsewhere.

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<sup>1</sup> Mr. Webster is, of course, a little inaccurate here. Congress may also "regulate the value" of its own coin. And it is an error to say that Congress can make only gold and silver a tender.

The argument as regards this last point, which Mr. Webster's expressions suggest, has been forcibly put by Mr. Holmes (now Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts), thus: "It is hard to see how a limited power, which is expressly given, and which does not come up to a desired height, can be enlarged as an incident to some other express power; an express grant seems to exclude implications; the power to coin money means to strike off metallic medals (coins) and to make those medals legal tender (money). If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"<sup>1</sup> In another place<sup>2</sup> Mr. Holmes again uses this argument and declares it to be, in his opinion, unanswerable. Mr. Justice Field, in the *Legal Tender Cases*<sup>3</sup> presses the same reasoning, in his dissenting opinion, and adds: "When the Constitution says that Congress shall have the power to make metallic coins legal tender, it declares in effect that it shall make nothing else such tender." To which Mr. Holmes adds, "We should prefer to say, it excludes the implication of a grant of more extensive powers."

This reasoning seems to me obviously defective.

(1.) It does not take the language of the Constitution as it stands. It puts a construction on it, viz.: that money and legal tender are here synonymous; and reasons as if this part of the Constitution contained the expression "legal tender." The Constitution does not, in terms, say that Congress may make coin a legal tender, although, truly, the power is not wanting; but it says nothing about legal tender. The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution.

(2.) This construction appears to be wrong. The Constitution, in the coinage clause, simply confers on Congress one of the usual functions of a government, that of manufacturing metallic money and regulating the value of such money. As to what shall be done with it when it is manufactured and its value regulated, the Constitution says nothing. I cannot doubt that the

<sup>1</sup> In 1 Kent's Com. (12 Ed.) 254 (1873); and also, before that, in 4 Am. Law Rev 768 (July, 1870).

<sup>2</sup> 7 Am. Law Rev. 147 (1872).

<sup>3</sup> 12 Wall. 651 (Dec. 1870).

word *money* in the coinage clause is limited to metallic money.<sup>1</sup> And Congress may do with it and about it, and may abstain wholly or in part from doing, what is ordinarily done by governments when they coin money; and so may make it a legal tender. But money is not necessarily a tender in discharge of contracts or debts; with us, foreign money is not;<sup>2</sup> some domestic money is not; for example, trade dollars,<sup>3</sup> silver coins, under the denomination of one dollar, for amounts over ten dollars,<sup>4</sup> copper and other minor coins, for amounts over twenty-five cents.<sup>5</sup> Undoubtedly the Legislature may make its coin a legal tender or not, as it pleases, and to such a partial extent, and with such qualifications as it pleases. In law, whatever is legal tender is money; but it is not true that whatever is money is legal tender. The clause of the Constitution, therefore, which provides for the coinage of money is not one which, by any necessary construction, says anything about legal tender. While, indeed, it is clear, having regard to the nature and ordinary use of coined money, to the ordinary powers of governments, to the control over this whole subject which is given to Congress by the Constitution, and to its silence as touching any restrictions regarding the power to make the money, when coined, a legal tender, — that Congress has full power to give or withhold this quality as regards its coined money, yet this power is inferential, and not express. The real argument, then, from the clauses relied upon by the learned persons above quoted, is not, as it is put; (*a*) Congress has an express power to make coin a legal tender; and so, (*b*) an implied power to make something else a legal tender is excluded. But it cannot be put higher than this: (*a*) Congress has an express power to coin money; (*b*) in that, is implied a power to make it a legal tender; and (*c*) this implied power excludes an implied power to make anything else a legal tender. That argument is not a strong one.

The power of Congress to make and put in circulation a paper currency, a paper medium of exchange, what Mr. Webster, in common with Adam Smith and Hamilton, and many another, calls "paper money," is now established. The express power to coin money does not exclude the implication of that. Why, then,

<sup>1</sup> But see Mr. McMurtrie's very able "Observations on Mr. George Bancroft's Plea for the Constitution."

<sup>2</sup> U. S. Rev. St. Sect. 3584.

<sup>4</sup> *Id.* p. 488.

<sup>3</sup> 1 Suppl. Rev. St. p. 254.

<sup>5</sup> U. S. Rev. St. Sect. 3587.

should the implied power of making coined money a legal tender exclude an implied power of making "paper money" a legal tender? As the power to coin money, and so to furnish a medium of exchange does not exclude an implied power to furnish another medium of exchange, a paper currency, "paper money," — so neither in its expression nor its implication does it exclude the implied power to make this other medium of exchange a legal tender.

But it may be thought that I have gone too far in saying, as regards metallic money, that the terms *money* and *legal tender* are not convertible terms. It is not forgotten that distinguished persons have held the contrary opinion. Mill has said: "It seems to me to be an essential part of the idea of money that it be legal tender."<sup>1</sup> A distinguished French writer, Say, has remarked: "The copper coin and that of base metal are not, strictly speaking, money; for debts cannot be legally tendered in this coin, except such fractional sums as are too minute to be paid in gold or silver."<sup>2</sup> Many other persons have held this as a doctrine of political economy, although it is a view which is by no means universally accepted.<sup>3</sup> In law, also, it is to be admitted that, generally, in the payment of debts and obligations, and on the side of penal law, as in a statute relating to the embezzlement of money, only what is a legal tender is money.<sup>4</sup> But it must also be remembered that the Constitution, in giving to Congress the power to coin money, is not, just then, concerned with the technicalities of law or political economy; it is disposing of one of the "*jura majestatis*" in brief and general terms, in phrases which are the language of statesmen. The terms used in this place import the manufacture of metallic coin, and do not comprehend the preparation of paper. But to say that they import no other metallic coin than that which is made a legal tender seems to be clearly an error. Even in strict law the term *money* sometimes covers things other than legal tender, as in the case of a gift of "money" in a will, which includes bank notes.<sup>5</sup> Of bank notes, also, Lord Mansfield said, in 1758, in *Miller v. Race*,<sup>6</sup> in an action of trover

<sup>1</sup> Principles of Pol. Econ. Book III. c. XII., s. 6.

<sup>2</sup> Pol. Econ. Book I. c. XXI., s. 10.

<sup>3</sup> See especially Francis A. Walker's acute and searching book on "Money."

<sup>4</sup> 2 Bish. Crim. Law, s. 357, Title Embezzlement, "Money means, as a general proposition, what is legal tender, and nothing else."

<sup>5</sup> 2 Williams Ex., Pt. 3, Book 3, c. II. s. 4.

<sup>6</sup> 1 Burr, 457.

for a bank-note: "They . . . are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind. . . . They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash." Of the guinea, first coined in 1664 and not made a legal tender till 1717, Holt, C. J., said, in 1694, in *St. Leiger v. Pope*:<sup>1</sup> "Do you think that it is not high-treason to counterfeit guineas? A guinea is the current coin of the kingdom, and we are to take notice of it." And then, above all, consider the usage of the time when the Constitution was made. Adam Smith, of whose great work on "The Wealth of Nations," the first edition was published in 1776, and the last, of those during his lifetime, in 1786, remarks: "Originally, in all countries, I believe, a legal tender of payment could be made only in the coin of that metal which was peculiarly considered as the standard or measure of value. In England, gold was not considered as a legal tender for a long time after it was coined into money."<sup>2</sup> I am not concerned with the precise accuracy of this statement in certain points of fact,<sup>3</sup> but only with its use of terms. Dr. Johnson, whose dictionary received his last corrections in the edition of 1773, defined money, with no reference to the idea of tender, simply and only as "metal, coined for the purposes of commerce." Hamilton, in 1790, in his opinion given to Washington, on the constitutionality of the bill to incorporate a United States Bank,<sup>4</sup> said: "The Bank will be conducive to the creation of a medium of exchange between the States. . . . Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose of money with different degrees of utility. Paper has been extensively employed."<sup>5</sup>

Observe, also, the sense of the term as used in our early statutes. In the first Coinage Act, of April 2, 1792,<sup>6</sup> in Sect. 9, ten coins, from eagles down to cents and half cents, are directed to be struck at the mint, and the value of them is regulated. Here appears to be the full exercise of the express power given in the Constitution,

<sup>1</sup> 5 Mod. at p. 7.

<sup>2</sup> Book I. c. 5.

<sup>3</sup> See *Coins of the Realm*, by the Earl of Liverpool, 143.

<sup>4</sup> *Lodge's Works of Alexander Hamilton*, III. 213.

<sup>5</sup> It is needless to say that Hamilton was not here advocating making the paper a legal tender.

<sup>6</sup> 1 U. S. St. at Large, 246.

"to coin money and regulate the value thereof;" and it will be remarked that it is exercised in regard to the copper coins no less than the gold and silver ones. In a later section (Sect. 16) the gold and silver coins, and these only, are made "a lawful tender in all payments whatsoever." But can there be any doubt that the two copper coins were regarded as "money"? If so, the doubt will vanish on looking at the Act of May 8, 1792, to "provide for a copper coinage,"<sup>1</sup> which, in furtherance of the previous Act, provided, among other things, that the cents and half-cents were to be paid into the treasury, "thence to issue into circulation," and that after a fixed time "no copper coins or pieces whatsoever, except the said cents and half-cents, shall pass current as money," and also enacted forfeiture and a penalty for paying or offering any other copper coins but these; but it said nothing of their being a tender. It was, I believe, more than seventy years before copper coin had the quality of legal tender.<sup>2</sup> As regards our later legislation, in the Revised Statutes of the United States (Sect. 3513), the trade dollar is classed among "the silver coins of the United States"; and in Sec. 3586 it is, with the rest, made a legal tender for amounts not over five dollars. By a statute of 1876,<sup>3</sup> the quality of legal tender is taken away from this "silver coin of the United States." Does it thereby cease to be money? The case of the trade dollar is peculiar. But imagine the government to coin some very large gold piece for supposed reasons of convenience in trade, without making it a legal tender; this, as I am told, was formerly done in Germany; is such a coin, therefore, not money? Suppose the government, for like reasons, to manufacture coins, of exactly the same size and value as those of England, or Russia, or Holland, not a legal tender, but supposed to be serviceable in foreign trade, would they not be money? Suppose such coins to be made for use in China as being readily taken there, would the case be essentially different? And, finally, suppose that Congress, instead of repealing that part only of Title 39 of the Revised Statutes which related to the trade dollar had repealed all of it; it is the seven sections of this title, under the separate heading of

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<sup>1</sup> 1 U.S. St. at Large, 283.

<sup>2</sup> Upton's Money in Politics, 259. Can there (to adopt the suggestion of a learned friend) be any doubt, if a State should issue a copper coinage like this, that the proceedings would be unconstitutional, as coining money?

<sup>3</sup> 1 Suppl. R. S. U.S. 254.

"Legal Tender," which give that quality to the coins of the United States ; would all our coins, manufactured as they are under the provisions of the separate Title 38, cease to be money? It seems clear that they would not ; and we must conclude that the term money, as used in the coinage clause of the Constitution, has that large and universal sense in which it is used in the reasonings of Aristotle,<sup>1</sup> of Adam Smith, and of Hamilton, viz.: that of a common metallic medium of exchange, "the common measure of all commerce."<sup>2</sup>

And, finally, before leaving this argument from the supposed express power in the coinage clause, it may be added, as was said before, that this argument would equally apply if the Constitution had retained the express clause giving power "to emit bills on the credit of the United States." It might still have been said that the implication of a power to give these bills the quality of legal tender was excluded by the coinage change. Yet the evident understanding of most of those who took part in the debates was, that if the power to emit bills was given it would carry with it the power to make them a tender, unless that power was expressly prohibited. There can be no doubt as to their understanding of that. The coinage change was not even alluded to. We have, then, in a way, the authority of these framers of the Constitution against the argument that the coinage clause excluded the implication of a power to make paper a legal tender.

III. But there are other grounds on which the power now in question is denied. It is said that it is not necessary and proper to the end of carrying out any express power given to Congress, and that it is inconsistent with the letter and spirit of the Constitution. Of these arguments an article in the "American Law Review,"<sup>3</sup> understood to have been written by Mr. Holmes, whose general contention they are put forward to support, has expressed a slighting opinion. "The case of *Hepburn v. Griswold*," he says, "(8 Wall., 603), was argued very much on the question whether the Legal Tender Act was a necessary and proper means of carrying out some of the powers expressly given to Con-

<sup>1</sup> Nicom. Eth. Bk. V. 5. "For this purpose money was invented, and serves as a medium (*μέσον*, mean, or means) of exchange, for by it we can measure everything. . . . Money is, indeed, subject to the same conditions as other things; its value is not always the same, but still it tends to be more constant than anything else," etc. Translation by F. H. Peters. London, 1881.

<sup>2</sup> 1 Hale's P. C. 184.

<sup>3</sup> Vol. VII. p. 146.



gress . . . and the case presented the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy." And, after referring to the later decision, in 12 Wall., 457, and expressing the opinion already referred to, that the argument drawn from the coinage clause is unanswerable to show that there is no power to make paper a legal tender, it is added: "Judges Strong and Bradley are more successful, to our mind, in meeting the shadowy argument drawn from the spirit of the Constitution as to impairing the obligations of contract, etc., than in overthrowing this. Less attention is given than in *Hepburn v. Griswold* to the fitness of the legal tender acts to accomplish their ends, which we must think a purely legislative question, in the absence of an obvious fraud on the Constitution."

This view of the arguments alluded to appears to be a sound one. It is said to be inconsistent with the spirit of the Constitution to make paper a legal tender because it is unjust; and it is pointed out that a great and avowed purpose of the Constitution was the establishment of justice.<sup>1</sup> That is an argument which has often been repeated, but it is of very slight importance. I do not mean that it is of slight importance to do an unjust thing; that is never a matter of small importance. But we are considering the value of arguments, and of arguments for the judicial setting aside of legislation; and I mean that this argument, as one justifying the declaration that a legislative act is void, is a slight one. The preamble of the Constitution in saying that its purpose is "to establish justice," etc., is making a large preliminary declaration relating to the total aim of the instrument as a whole. If the question were about legislation reducing the duty on wool, and it should be argued in a judicial opinion that the law is contrary to the spirit of the Constitution, because it is the aim of that instrument "to form a more perfect union," while this law is necessarily unsatisfactory to the people of a certain section of the Union, and tends to alienate them from it,—that kind of reasoning would be instantly felt to be out of place. It seems, at best, to belong to legislative, rather than judicial discussion. An answer to this sort of argument may be collected from an important early case,<sup>2</sup> which held that Congress might constitutionally give the govern-

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<sup>1</sup> 8 Wall., 622, per Chase, C. J.

<sup>2</sup> *U. S. v. Fisher*, 2 Cranch, 358 (1804).

ment priority over other creditors ; and, therefore, that a law could not be held void which provided that where any revenue officer, or other person, should hereafter become indebted to the United States, and then insolvent, the debt due to the United States should be satisfied first, without limiting this postponement of private creditors to the case of such as should become creditors after the passage of the law. Mr. Justice Washington described this law, if interpreted as the Court did interpret and sustain it,<sup>1</sup> as "productive of the most cruel injustice to individuals," and tending "to destroy, more than any other act I can imagine, all confidence between man and man." He himself found it possible to interpret the law as applying only to persons accountable to the government, and so as not applicable to this case ; and he therefore dissented from the opinion of the Court. But he admitted the power of Congress to go further if it saw fit : "The sovereign may in the exercise of his powers secure to himself this exclusive privilege of being preferred to the citizens ; but this is no evidence that the claim is sanctioned by the claims of immutable justice. If the right is asserted individuals must submit," etc. And the Court (Marshall, C. J.), interpreting it to cover all debts, said : "The power is not prohibited. But it is said, and it is true, it must appear to be granted. It is so under the power to make all laws necessary and proper to carry into execution the powers vested. It need not be indispensable ; Congress may use any means which are, in fact, conducive to the exercise of any powers granted by the Constitution. It has the power to pay the debts of the Union, and it must be authorized to use the means which appear to itself most eligible to effect that object."

But, again, apart from the phrases of the preamble of the Constitution, it is said that the spirit of the Constitution as regards contracts is shown by the contemporaneous provisions which were made by the Congress of the Confederation sitting at the time of the convention, in framing the ordinance for the North-western Territory,<sup>2</sup> viz., that no law should be passed there which interfered with private contracts, and also by the provisions of the Constitution prohibiting States from impairing the obligations of contracts. And so the Court (Chase, C. J.) says : "A law not made in pur-

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<sup>1</sup> U. S. v. Fisher, 2 Cranch, p. 402.

<sup>2</sup> Chase, C. J., in *Hepburn v. Griswold*, 8 Wall. 622.

suance of an express power, for example, to pass bankruptcy laws which necessarily and by its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." Like arguments are drawn from the fifth amendment, prohibiting the taking of private property for public purposes without compensation, and the taking of property without due process of law. Indeed, this last provision is regarded as "a direct prohibition" of the legislation now in question; and so the reasoning, as regards this clause, is, that the legal-tender legislation is contrary not merely to the spirit of the Constitution, but to the letter of it.

This argument discriminates between laws made in pursuance of express powers and others. Why is this? If the argument is not good as regards express powers, which appears to be conceded, why should it be good as regards those that are implied or auxiliary? If the implied power be otherwise plain it is difficult to see why it should be treated any differently as regards the exercise of it, or its relation to the spirit of the Constitution, from any other power. As regards the existence of any alleged power, whether a main or auxiliary one, whether express, implied, constructive, inferential, or what not, the same questions are to be asked, viz.: Is it, upon the fair construction of the instrument, given? If it is given, how far, if at all, is it qualified? <sup>1</sup> In the preference case,<sup>2</sup> the Court saw no sufficient reason for denying the existence of an implied power on the ground of injustice in the exercise of it, as impairing the obligation of contracts or taking away private property without compensation or due process of law; although the direct and inevitable operation of the law was to deprive the debtor of the ability to pay a part of his debts, and so to deprive the creditor of his property. As regards the legal-tender law, it is not true, in any other sense than it was true in Fisher's case, that there is the direct and inevitable injury spoken of by the Chief-Justice in *Hepburn v. Griswold*.<sup>3</sup> If the notes are convertible and sufficiently secured, the legal-tender quality need not produce injury; that is the case to-day with our legal-tender notes; there is no direct and inevitable injury.

IV. Leaving now the special consideration of arguments against the power in question, it is time to give, affirmatively, the reasons

<sup>1</sup> *Juilliard v. Greenman*, 110 U. S., at p. 448; *Legal Tender Cases*, 12 Wall., at p. 550 per Strong, J.

<sup>2</sup> *U.S. v. Fisher*, 2 Cranch, 358.

<sup>3</sup> 8 Wall., at p. 623.

for believing that making the notes of the Government a legal tender for debts may fairly be held necessary and proper for the exercise of some of the powers granted in the Constitution.<sup>1</sup>

1. This power is really involved in the power of issuing or authorizing a paper currency. That power may be derived from the power to regulate commerce, as Hamilton seems to have derived it, in urging upon Washington the signing of the Bank Act, at the outset of the government.<sup>2</sup> "The bank," he says, "will be conducive to the creation of a medium of exchange between the States and the keeping up of a full circulation. . . . Money is the very hinge on which commerce turns." And he adds that the whole or the greatest part of the coin in the country may be carried out of it. Years before<sup>3</sup> Hamilton had condemned as visionary the notion that coin was adequate to the purposes of currency. This power of providing a paper currency is variously accounted for. In the *Veazie Bank* case,<sup>4</sup> the Court, while declaring it, did not state where it was found. Webster derived it from

<sup>1</sup> It is not necessary to emphasize the point in regard to this question, but it is worth remarking, as we pass, that courts, in declining to pronounce a legislative act unconstitutional, are not, in reality, required to hold any distinct, affirmative opinion that the measure is constitutional. They are engaged in revising the action of another department of the government, and their duty is indicated in Cooley's phrase: "To be in doubt, therefore, is to be resolved, and the resolution must support the law." (Princ. Const. Law, 153.) It is still more plainly indicated by such a statement as that of Mr. Justice Thomas (Opinion of the Justices, 8 Gray, p. 21) when he sustains the constitutionality of an act of the legislature "upon the single ground that the act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void." It is not a difficult inference from these expressions that the judge's own opinion was, that this act was, in fact, not warranted by the Constitution. To the like effect is the very common expression of the judges that, in order to justify the judicial declaration that legislation is unconstitutional, the fact must be plain "beyond a reasonable doubt." *Ogden v. Saunders*, 12 Wheat., at p. 270, per Washington, J.; *Sinking Fund Cases*, 99 U. S., at p. 718, per Waite, C.J.; *Wellington, Pet'r.*, 16 Pick., at p. 95, per Shaw, C.J.; *People v. Sup. of Orange*, 17 N. Y., at p. 241, per Harris, J.; *Cooley Const. Lim.* 183. See *Von Holst Const. Law of U.S.* 64, 65 (Chicago, 1887). The remark that the Constitution is a law, and, therefore, can have but one allowable interpretation, and that one the interpretation given to it by the Court, overlooks the essential peculiarity of that form of law which we call a Constitution. See a letter to the *Nation* of April 10, 1884, in which the present writer has enlarged upon this topic. One must not, to be sure, emphasize too heavily a single expression, like this of a "reasonable doubt." But an analysis of the reasons for the general principles adopted by Courts in passing upon the constitutionality of legislation will be found to lead to very important conclusions; and these are well intimated by that expression and its connotation in other parts of the law.

<sup>2</sup> Lodge's Works of Hamilton, III. 213.

<sup>3</sup> In 1781, Letter to R. Morris, *ib.* 102.

<sup>4</sup> 8 Wall. 533.

the coinage clauses of the Constitution, including the prohibition on the States.<sup>1</sup> Webster also found it in the power to regulate commerce.<sup>2</sup> Chase, C. J., in 12 Wall. 574, 575, puts the power to emit bills on the borrowing clause, and the power to regulate commerce; and as to the power to exclude from circulation all but government notes, he says that it "might perhaps be deduced from the power to regulate the value of coin"; and that "this was the doctrine of the *Veazie Bank v. Fenno*, although not fully elaborated in that case."

Now, in furnishing the currency, what may the government do with it? Why may it not, as a question of legal power, make it do the full and usual office of money; that is, make the tender of it the legal equivalent of a tender of metallic money? If, as we see reason to believe, this was not prohibited, and not inconsistent with any provisions of the Constitution; and if, at the same time, it was a power which had been frequently exercised by those legislative bodies with which the framers of the instrument were most familiar, and was generally deemed by them to go along with that power of furnishing a paper currency, which they did confer upon Congress; if, like the power of conferring upon coin the legal-tender quality, it be a power which naturally, and according to the usage of nations, is included in that complete

<sup>1</sup> "The exclusive power of regulating the metallic currency of the country would seem necessarily to imply, or, more properly, to include, as part of itself, a power to decide how far that currency should be exclusive, how far any substitute should interfere with it, and what that substitute should be."—Works, III. 395. "Let me ask whether Congress, if it had not the power of coining money, and of regulating the value of foreign coins, could create a bank, with the power to circulate bills. For one, I think it would be difficult to make that out." *Ib.* 413. See *Legal Tender Cases*, 12 Wall., at p. 545, per Strong, J. Also "Observations on Mr. George Bancroft's Plea for the Constitution," by Richard C. McMurtrie (Philadelphia, 1886), pp. 16-24.

<sup>2</sup> "It is clear that the power to regulate commerce between the States carries with it, not impliedly, but necessarily and directly, a full power of regulating the essential element of commerce, namely, the currency of the country, the money, which constitutes the life and soul of commerce. We live in an age when paper money is an essential element in all trade between the States; its use is inseparably connected with all commercial transactions. . . . I understand there are gentlemen who are opposed to all paper money, who would have no circulating medium whatever but gold and silver. . . . I would ask this plain question. Whether any one imagines that all the duty of government in respect to currency, is comprised in merely taking care that the gold and silver coin be not debased? . . . If government is bound to regulate commerce and trade, and, consequently, to exercise oversight and care over that which is the essential element of all transactions of commerce, then government has done nothing, etc." Works, IV. 315, 316.

control over money and the currency which is given to Congress, then it cannot well be denied to our national government. Such legislation may or may not be highly objectionable. It may in a perilous time be useful, and even necessary, to the proper discharge of the duty of a government. Or it may in ordinary times be very immoral and even outrageous legislation. But it is not for a Court to act as the keeper of the legislative judgment or the legislative conscience on a legislative question. When, in the early part of the war that was carried on here twenty odd years ago, the State banks broke down, it was thought by Congress highly important, if not absolutely necessary, that the government should furnish a currency to the country; commerce could not go on without it; there was not coin enough to do the business of the country. The emission of government bills of credit was a natural and suitable method, not merely of doing other things, but of supplying a currency. And in the straits to which we were then reduced, the credit of the government being gravely in doubt, foreign nations expecting our downfall, and our own people fearful of the result, even the government promises could not command confidence.<sup>1</sup> At such a time a currency resting only on the government credit would not, it was thought, do the office of a medium of exchange, or would not do it reasonably well, without giving it the full, usual and legal quality of money; with that quality it served the purpose. If it be said, as it has been said, that it would have served the purpose as well, or better, if to each note had been annexed the right to ride in every railway car in the country, to enter places of public amusement and the like, the answer is, that it is true that such privileges would have helped; but these incidents would have been foreign to the purposes of a currency. To make the currency do the usual office of money more effectually and fully, is legitimate regulation of the currency. To make it do the special office of theatre tickets or railroad tickets is superadding to its quality as currency, as money, or its equivalent, another and foreign quality.

2. Congress, having the power to furnish a paper currency, and to give to that currency such qualities as may make it do the full and usual office of money, may use its own currency, in any of its forms, in order to borrow money. And, in combining these

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<sup>1</sup> Miller, J., in *Hepburn v. Griswold*, 8 Wall., at p. 632; Strong, J. (for the Court), in *Legal Tender Cases*, 12 Wall., at p. 540.

functions of issuing a currency and borrowing money, if Congress give to its currency the quality of legal tender, wholly or mainly, because it will thus be a better instrument for borrowing purposes, it will not be in the power of a court to declare the legislation for that reason unconstitutional.

It will be convenient here to make a few discriminations. In order to supply a paper currency the government need not emit bills; it may charter a private bank to provide a circulation, and may simply regulate its operations; and it may be itself a stockholder, as in the case of the United States Bank. Or it may avail itself of banks already established. In such cases there is no borrowing of money. On the continent of Europe, as I am informed, most of the cases where governments made the paper currency a legal tender, before the time of our Constitution, — and, some of the instances, since, but not all, — were those of giving this quality to the paper of private or *quasi* public institutions; not to government bills. Now, in such cases, the government does not necessarily borrow money. Again, even where it makes its own paper a currency, and a legal-tender currency, it does not necessarily raise money on it, except, of course, in so far as it may go on to pay its debts with it, and thus borrow by a forced loan; for it may, as the States sometimes did,<sup>1</sup> cause its paper to be given out by lending it on the security of other property. Or it may issue it to banks on their giving security for its redemption, and merely allow them to use it and issue it as a circulating medium. In such a case there is no borrowing by the government.

The case of the present National banks is not quite this; for they take notes furnished by the government and issue them as their own, and are fully and primarily responsible upon them; but the government is a sort of guarantor, and holds specific property of the banks, viz. government bonds, as security, to be applied to the redemption of the notes, being itself bound to redeem them on the failure of the banks to do so, and having the right to apply the bonds to reimburse itself. Now, there is here a remote element of borrowing; that is to say, the property of the banks which must be deposited consists of the securities of the United States; and, in order to get those securities, the banks, or somebody else, must have lent money to the United States. So that, under the existing

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<sup>1</sup> *Craig v. Mo.*, 4 Pet. 410.

system, the United States says: (1) there shall be a currency for the whole country; (2) it shall be furnished by the United States and guaranteed by it, but issued through private banks; (3) in receiving these printed notes the banks shall leave as security with the United States a certain quantity of bonds of the United States which are their own property; (4) they must return these notes to the United States before they can have their bonds again. This, of course, is uniting the operation of the two powers of borrowing and of issuing a currency. If the government, instead of this arrangement, were to issue its own currency directly, like the greenbacks, it need not necessarily borrow with it; for it might, as we have seen, lend it on security (which might or might not be its own bonds), to be used by others.

But, on the other hand, it may borrow money with it; and that is the natural and obvious way of giving out its currency. That was, in point of fact, done during our great rebellion. If this currency be one which is the full legal equivalent of money, a legal tender, the principle is still the same; the government may borrow with this currency as well as any other. When the government notes consist of promises to pay, the phrase of borrowing is, of course, strictly applicable. It is true we more commonly speak of this operation as that of the government selling its bonds or notes, as we speak of a man selling his own promissory notes. But it is, in fact, borrowing money on a promise to pay; and in the case of the government it is borrowing upon a kind of promise to pay, which is a part of the medium of exchange, and of that which is, in the full legal sense, money.

We perceive, then, a great difference between private borrowing and public borrowing.<sup>1</sup> When a nation borrows it may, as we see, borrow with its currency; and if its currency be made a legal tender it may borrow with that. I do not say, if a government were denied the power of establishing a paper currency at all, that it could give to its paper the quality of legal tender in order to borrow with it. To do that would, indeed, help the borrowing process; but, on the supposition I am now making, viz., of a government with no power to establish a paper currency, it would be an evasion of the restriction put upon it, to say that it could, merely for facility of borrowing, annex to its security a quality which would be forbidden if it were not borrowing. It is not, then,

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<sup>1</sup> And so *Juilliard v. Greenman*, 110 U. S. at p. 448, per Gray, J.



as part of the mere, bare, simple process of borrowing that Congress is to be said to have the power of giving to the government paper the quality of money. But it is as part of the borrowing power *of a nation*;<sup>1</sup> of a body which has other governmental powers, such as the power of establishing a paper currency, and so of annexing to it the legal-tender quality; the power and duty of raising armies and providing for their support, and so of raising money suddenly and in vast quantities; and the like. Such a body may borrow with its currency and with its legal-tender currency.

If there be any exigency, as, for example, that of war, in which the government may make its own notes, or any other, a legal tender, it seems to be purely a legislative question when such an exigency has in point of fact arisen. This was the unanimous opinion of the Court in *Juilliard v. Greenman*.

*James B. Thayer.*

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<sup>1</sup> *Juilliard v. Greenman*, 110 U.S. 421, 444-448. The pamphlet of Mr. Bancroft, called out by this case, proceeded upon singular misconceptions, and was unworthy of its author's fame.

# HARVARD LAW REVIEW.

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THE next number of the REVIEW will appear in October. We are fortunate in being able to announce for that number articles by Professor William A. Keener, of the Law School, and Frederick Jessup Stimson, of New York.

AN important subject in its influence on legal education is the number of years of study required for the ordinary degree of A.B. Earlier in the century four years did not seem too short a time for this degree; for the age at which men entered college was much lower than the average at the present day. Professional study was also much slighter. A large proportion of lawyers studied solely in offices, and in the law schools which then existed the course was comparatively short. The times have changed. The number of studies required for admission to college has gradually increased, and the age at entrance has steadily risen, until now at Harvard the average age at entrance is nearly nineteen years. At the same time legal study has increased its demands. In the various law-schools of the country the ordinary course is two years, and here in Cambridge a third year has been added. Under these circumstances a fourth year in college seems unnecessary. It makes the college course out of proportion to the period of professional study that must follow the A.B., and brings into the law either men who feel it a necessity to enter practical work as soon as possible, or men who have omitted a college course altogether.

The number of students who try to finish the college course in three years is slowly increasing. Last year, at Cambridge, the Conference Committee, composed of certain professors and representatives chosen from the undergraduates, recommended that seniors be allowed to take courses in the law-school, such courses to count toward the degree of A.B. This recommendation has not been acted upon; and as the Conference Committee has ceased to exist, the matter has been dropped. It shows, however, in a slight way, the general drift of

feeling on the subject. Without venturing to give any opinion ourselves, we desire merely to point out the importance of this question; for it is safe to predict that, sooner or later, the relation between college and professional courses of study must be put upon a more satisfactory basis.

APROPOS of Professor Ames' article in our last number, we find the doctrine of 'prior equities' concisely stated more than a hundred years ago, in Germany, by the illustrious critic whom Goethe called the Achilles, and Heine the Arminius, of German literature:—

*"Nathan : Who has no greater right to her than I  
Must prove at least an earlier."*

*Nathan the Wise, II. 7.*

MR. J. W. MACK, a member of the present graduating class, has been recommended by the Academic Council for appointment to a fellowship, and will spend several years abroad in the study of the civil law. It is the first time, we believe, that a representative of the law school has asserted its right to share in the advantages furnished for the pursuit abroad of the higher branches of learning. The prompt recognition of that right is certainly gratifying. The fact that a student of the common law proposes to devote a number of years to the study of the civil law is a significant one in its bearing on legal education. It may be that the civil law has been too long neglected.

THE students of the Harvard Law School claim domiciles in twenty-eight different jurisdictions. If they practise in the same jurisdictions from which they come, the Massachusetts bar, already so largely made up of Law School bred men, will receive 82 additions. Ohio courts stand next, with a list of 15. New York will be satisfied with 13 out of the 180 now in the school, while Illinois will take 9. Five each will go to California, Maine, New Hampshire, Pennsylvania, and Rhode Island.

THE Harvard Law School Association has issued a pamphlet of about a hundred pages, containing a report of the organization and of the first general meeting of the Association on Nov. 5, 1886. In addition to the list of officers and members, a full account is given of the exercises in Sanders Theatre, and of the after-dinner speeches, which were delivered in the Hemenway Gymnasium, on the occasion of the first public dinner of the Association. The frontispiece is an excellent heliotype of Austin Hall.

THE well-known authority on railroads, Prof. Arthur T. Hadley of Yale, in his recent lecture in Cambridge on the Interstate Commerce bill, expressed himself strongly in favor of leaving the problems of railroad charges and management to work themselves out in the courts as questions arise from time to time. The result of a railroad law thus gradually evolved and perfected to meet the needs of the country would be less injurious to business, and would cause less derangement of economic machinery than any statute or series of statutes, however good. He said, however, now that the bill is passed, it should be given a fair trial and not thrown over too soon, simply because it causes losses in some quarters.

THE following law clubs have been carrying on work during the present year: Pow-Wow, Ames-Gray, Thayer, Austin (all with supreme and superior courts), Choate, and Langdell. The Choate Club is the Harvard Chapter of the Phi Delta Phi, a law-school fraternity with chapters in all the leading law schools of the country. The Langdell society is a new organization among the members of the third-year class, the primary object of which is to encourage legal essay work. It has also, as a side issue, conducted a series of jury trials. The total membership of the clubs, allowing for those members counted twice, is seventy-seven, a proportion of four-ninths of the students engaged in work outside of the regular courses.

THE Selden Society, of which we spoke in our last number, has issued a rough draft of a prospectus to be submitted to the Provisional Committee for approval. In it the announcement is made that the society "has been formed mainly for the purpose of collecting and editing in a convenient form materials for the development of English legal history. Vast stores of material of the most valuable kind, illustrative of the growth and the principles of the mediæval common law, lie buried in unindexed and uncalendared records of the realm at the Public Record Office, and in unpublished MSS. in public and private libraries, and one main object of this society will be to collect and publish selections from these records and manuscripts." The annual subscription to the society is one guinea, due on the first of January, for the year then commencing. Members have no further liability of any kind. Each subscriber will receive a copy of all the publications of the year. A subscription of twenty guineas is accepted in lieu of all annual subscriptions. Subscriptions in this country may be sent to Prof. James B. Thayer, Cambridge. In addition to the General Council of the Society in London, committees will be formed in America and in each of the British colonies.

It is gratifying to note that, almost simultaneously with the desire among the members of the English profession which gave birth to the Selden Society, the members of our faculty have taken steps to give the students an opportunity to gain an insight into the historical formation of the early common law. This term, for the first time in any law school of the country, an interesting and valuable course, which is concealed under the modest title of "Points in Legal History," is being given in our school. It is the result of years of careful study and diligent investigation in the sources of the common law. The course takes up the origin of the actions of tort and contract, with brief reference to the law of property, and the fusion of law and equity. The course is by no means the dry collection of isolated cases which the frequent mention of Bracton, Britton, and the Year Books might suggest. It gives a united historical account of the rise and development of the most common of the common-law actions. It offers an opportunity of instruction to the members of the school in a branch of the law of which the learned assembly at the formation of the Selden Society, as of one voice, declared themselves lamentably ignorant. It is, therefore, pleasant to find that, at this awakening to the importance of historical study which is gaining ground so rapidly in England, our school is already in the field, with the services of a professor whose information on this subject is the result of long and careful research.

ANOTHER protest against the present unsatisfactory state of the law as to expert witnesses has been recently made. The author is Mr. Clemens Herschel, a civil engineer, who attempts to interest scientific men in the matter by means of an essay contributed to the *Engineering News*, and continued in the numbers for April 9, 16, and 23. He states that as results of the present system of partisan experts, the best scientific men do not now appear on the stand in the rôle of experts, and that a limited and objectionable class of professional experts, or lawyers in scientific disguise, is being developed, who do not exercise "untrammelled the judicial functions of the mind." He advocates the introduction of the continental system of experts summoned by the court, and ridicules the "cant phrase" that this system is "contrary to the spirit and genius of our institutions," for the court is not bound by these opinions, and its functions are not encroached upon. He calls for legislation to make this class of witnesses, who give opinion-evidence, the "servants of the court," and to provide for the manner in which they, like masters in chancery, shall make their reports.

It may be added (for Mr. Herschel, not being a lawyer, has not ventured to assert it with certainty) that the system of summoning experts by the court, so far from being hostile to our institutions, has been, up to the present century, an established custom in common-law practice. Of later years it has not been frequently used. But as recently as 1877, this right of the court was asserted by Jessel, M. R. (6 Ch. D. 416.)

At the breaking out of the Revolutionary War, Isaac Royall, a wealthy gentleman of royalist opinions, left this country for England, where he died, in 1781. He did not forget the land of his birth, however; for, by his will, recorded at the probate office in Boston, he devised a certain portion of his estate to the Overseers and Corporation of Harvard College, "to be appropriated towards the endowing a professor of laws in the said college, or a professor of physic and anatomy, whichever the said Overseers and Corporation shall judge to be best for the benefit of the said college." The funds which the college received by this devise remained unappropriated until 1815, when the Hon. John Lowell, a member of the corporation, procured the establishment of a professorship of laws. In memory of its founder the chair was called the "Royall Professorship,"—a name it has kept to the present day. As the income was insufficient for the support of a professor, the necessary amount was made up from the general funds of the university. The first professor to occupy the chair was the Hon. Isaac Parker, late Chief-Justice of Massachusetts. In 1817 the university founded another professorship. The Hon. Asahel Stearns was appointed the first professor. By the conditions of the professorship he was required to "open and keep a school in Cambridge." From this time the establishment of the Law School is dated. Chief-Justice Parker never resided in Cambridge, but, in the performance of his duties as professor, was accustomed to read a course of lectures every year, which was open to the senior class of the college, as well as to members of the school. The date of the founding of the Law School is, therefore, given as 1815-1817; the former marks the appointment of the first professor of law, and the latter marks the establishment of the first resident professorship.

## THE LAW SCHOOL.

## IN THE CLUB COURTS.

SUPREME COURT OF THE POW-WOW.

*Insurance. Right of insurer to assignment of mortgage debt.*

The defendant was mortgagee of Jones, for a house of the value of \$1,000. The plaintiffs were insurers of said house for the defendant, in the sum of \$1,000. The mortgage debt was also \$1,000. The house was subsequently destroyed by fire, and the plaintiffs, having paid the insurance money, bring this action to obtain from the defendant an assignment of his mortgage interest. The defendant had made the insurance in his own name without describing his interest as that of a mortgagee, and paid the premiums out of his own funds.

On these facts the court held for the plaintiff, on the following reasoning: There were in this case two separate contracts, — the mortgage debt and the policy of insurance. But they must be looked at together, in the light of the peculiar law of insurance, which says that a person who has been subjected to a loss of property by fire shall be indemnified. The defendant has been indemnified by the payment of the insurance money, which is the equivalent of his mortgage debt. If he is also allowed to retain the debt he will eventually have obtained double satisfaction, which would not only be in violation of the indemnity principle of the law of fire insurance, but would be placing a premium on incendiarism.

Now, the insurer of a person who has a remedy against some one to compel him ultimately to make good the loss stands in the position of a surety. *Darrell v. Tibbitts*, 5 Q. B. Div. 560. Though the mortgagee by the fire loses the security for the debt, and not the debt, yet as the ultimate object in view was the insurance of the debt, accomplished by means of insuring its security, payment of the insurance money places him in the same position as though he had lost the property through redemption. He having thus been indemnified, the insurer should succeed to his rights against the mortgagor, in order that the loss may be placed where it belongs. *Darrell v. Tibbitts*, 5 Q. B. Div. 560; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *Sussex Ins. Co. v. Woodruff*, 2 Dutcher, 541; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. at 359. The only decisions *contra* are in Massachusetts.

It may be objected that the mortgagee has lost his premiums; this is certainly true; but if his debt was a good one he could have no object in insuring, except as a speculation, which the law does not allow. If he chose to insure the house as a security for his debt, rather than trust solely to the mortgagor's solvency, there is no reason why he should reap the benefit of such insurance without paying for it.

SUPREME COURT OF THE THAYER.

*Same case as the preceding.*

The facts were identical with those in the preceding case; but the court reached an opposite conclusion, in favor of the defendant, on the following grounds: The right claimed by the company in this case cannot

be put on the ground of subrogation. There is no payment of the mortgage debt, for no one could pay it but the mortgagor. But to have subrogation it is necessary that the debt should be extinguished at law. The right must, therefore, be put upon some other ground.

It is said that a contract of insurance is a contract of indemnity, and that the company here has agreed to insure the defendant against loss upon his debt; and that practically the only way of adjusting such a loss is the method here proposed by the company. It seems, however, a conclusive answer to this, that the parties never contemplated insuring the debt, nor would the company, probably, have authority to insure a debt. The defendant was insured against the loss of certain property; and it is for such loss that the company must pay. *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343. If the debt had been the thing insured it would be necessary to find in each case how much the mortgagor's ability to pay the debt had been lessened by the fire; and that would be the measure of damages on the policy. Such, however, is not the course pursued.

In fact, the debt has nothing to do with the case. The defendant acquired his interest in the premises through the mortgage deed; and that instrument alone, not the mortgage debt, concerns this case. By the deed the defendant acquired an insurable interest in the property, equal, even in equity, to the amount of the mortgage debt. It is for the loss that has happened to *his* property that he recovers, and the company, having paid only what it agreed to pay, has no equity to claim the debt, and thus to deprive the defendant of the profits of his investment. (Bunyon, Insurance, 3d ed., p. 243.) If any one has an equity to have the insurance money applied in payment of the debt it is the mortgagor, not the company; and this equity would arise only upon maturity of the debt. The defendant had a right to recover the insurance money, and he has now a right to hold both the money and the debt. This right is recognized by the best late authorities. *Wood, Insurance*, p. 782; *Insurance Co. v. Boyden*, 9 All. 123; *King v. Insurance Co.*, 7 Cush. 1.

### FROM THE LECTURE ROOM.

These notes were taken by students from lectures delivered as part of the regular course of instruction in the school. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.

**WRONGFUL CONVERSION OF A TRUST FUND. RIGHTS OF THE BENEFICIARY.** — (*From Professor Ames' Lectures.*) — Where a trust fund is misappropriated and converted into other property, the delinquent fiduciary may be charged as a constructive trustee of the newly acquired property.<sup>1</sup>

If, however, the defrauded *cestui que trust* cannot trace the trust fund, directly or indirectly, into any specific property or fund, the trust, for want of a *res* to which it can attach, is extinguished, and the *cestui que trust* becomes a creditor.<sup>2</sup>

But, although the trust is gone, the circumstances may be such as to give the defrauded *cestui que trust* the position of a preferred

<sup>1</sup> Ames, Cas. on Trusts, 321, 325 n. 1.

<sup>2</sup> Ames, Cas. on Trusts, 331, 332 n. 1.

creditor. If, for instance, the fiduciary becomes bankrupt, and it appears that the fund for distribution among his creditors has been increased by the misapplication of the trust fund, it is obviously inequitable that the other creditors should derive any advantage from such increase. In other words, they ought not to be permitted unjustly to enrich themselves at the expense of the innocent *cestui que trust*. The latter's right to a preference has, accordingly, been recognized in several cases.<sup>1</sup>

CONSIDERATION VOID IN PART. — (*From the lectures of Prof. Keener.*)—Under the doctrine of consideration void in part, the offeree may, if he finds among the things requested by the offerer in exchange for his promise, that which is in itself or in law impossible of performance (*Cripps v. Golding*, 1 Rolle's Abr. 30), or that which if standing alone would not be sufficient as a consideration (*Crisp v. Gammel*, Cro. Jac. 128), disregard the terms of the offer, and on his doing what remains, the offerer will be bound.

This doctrine cannot be supported on principle.

The objection to it is not that it violates any principle of the law of consideration, but that it violates the fundamental principle of the doctrine of mutual consent. The law recognizes in general the right of the offerer to propose the terms on which he will be bound. When one offers to become bound on another's doing certain things, the doing of those things is as much a condition precedent to the creation of an obligation as the doing of them would be a condition precedent to the creation of a liability, if, instead of making an offer, the party had covenanted to do certain things on the covenantee's doing the things in question.

The true doctrine would seem to be that while the offer will not ripen into a promise until the offeree has done all that the offerer requested him to do, yet, when all has been done, it is no defence for the promisor to say that some of the things done were insufficient in point of consideration.

To satisfy the fundamental principle of mutual consent, all must be done that the offerer requests.

The law of consideration is satisfied if, in doing those things, the offeree has, because of the doing of any one of them, suffered a detriment at the promisor's request in exchange for his promise.

EQUITY, SPECIFIC PERFORMANCE, MUTUALITY OF REMEDY. — (*From Prof. Langdell's Lectures.*) — The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember. The rule is entirely one of remedy; that the remedy by specific performance must be mutual.

The rule assumes that the contract is bilateral. It does not mean that there may not be specific performance of a unilateral contract. There may be performance of such a contract; for instance, of a covenant to convey land, made upon good consideration. From the terms of the rule it is assumed that the contract itself is mutual, that is, bilateral;

<sup>1</sup> *Peak v. Ellicott*, 30 Kas. 156; *Ellicott v. Brown*, 31 Kas. 170; *Harrison v. Smith*, 83 Mo. 210 (overruling *Mills v. Post*, 75 Mo. 426); *People v. City Bank*, 66 N. Y. 32; *People v. Dansville Bank*, 39 Hun, 187; *McColl v. Fraser*, 40 Hun, 111 (semble); *McLeod v. Evans*, 66 Wis. 401.

But see, *contra*, *White v. Jones*, 6 N. B. R. 175; *Re Hosie*, 7 N. B. R. 601 (semble); *Re Coan Co.* 12 N. B. R. 203; *Illinois Bank v. First Bank*, 15 Fed. Rep. 858.



or, at least, that it was intended to be bilateral. If one side of a contract fails, but the other is, for some reason, binding, it is really a unilateral contract; yet equity will not enforce it. A recognized exception is the case where one side of a contract is in writing, the other unenforceable by the Statute of Frauds. In that case, perhaps in deference to the language of the statute, the side which has been put in writing will be enforced. (*Hatton v. Gray*, 2 Ch. Cas. 164.)

It is generally agreed that the mutuality has reference to the state of things when the contract was made; otherwise the rule involves an absurdity, for the remedy is almost never mutual at the time of filing the bill. The plaintiff alone can then have a remedy; he cannot maintain his bill unless the defendant is in default and he himself is not in default; the defendant in such a case could not maintain a bill. It is not a question, therefore, of the time when the remedy is sought, but of the time when the contract is made.

It is doubtful whether the rule as to mutuality is in force in Massachusetts. In the case of *Dresel v. Jordan* (104 Mass. 407), it was assumed that the rule was in force, and that, therefore, it would follow that a vendor of land could generally file a bill for the purchase-money. The correctness of this assumption, however, seems to be greatly shaken by the later case of *Jones v. Newhall* (115 Mass. 244), decided by the same judge. That was the case of a contract for the sale of shares in a land company. The purchase-money was payable absolutely; conveyance of the shares was conditional on payment of the purchase-money. The vendor filed a bill to recover the purchase-money, and the court dismissed the bill, on the ground that the remedy at law was adequate.

It seems impossible to reconcile this decision with the assumption in the case of *Dresel v. Jordan*. The vendee could have performance; therefore, if the rule as to mutuality of remedy is in force, the vendor should have it. The court does not notice the case of *Dresel v. Jordan*, and does not discuss the question of mutuality of remedy; it inquires only whether in the particular case the plaintiff has an adequate remedy at law. This is in fact an utter repudiation of the principle of mutuality of remedy. It is by no means to be regretted that this rule should be repudiated.

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## RECENT CASES.

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**ATTORNEY — IMPLIED AUTHORITY.** — An attorney-at-law has implied authority to do all things which affect the remedy only, and not the cause of action; he may, therefore, dismiss a suit. *Davis v. Hall*, 3 S. W. Rep. (Mo.) 383.

**CARRIER — LIMIT OF LIABILITY.** — A common carrier cannot by contract avoid its liability for negligence; but where rates of transportation of freight are graduated according to the value of freight, and a limit of liability is fixed for each class of freight, a shipper who chooses to ship an animal worth \$5,000 in a class in which the limit is fixed at \$75, cannot for the loss of the animal recover more than \$75. *Hill v. R. Co.*, 10 N. East. Rep. (Mass.) 836. To the same effect. *R'y Co. v. McCarthy*, Weekly Notes (Eng.) 1887, p. 34, reversing s. c. L. R. Ir. 18 Q. B. D. 1.

**CONDITIONAL SALE.** — When the question is whether corn was bought conditionally upon the result of "inspection" after delivery to vendee, it is for the jury to decide whether the selling of a portion after delivery but before inspec-

tion was possible, or the exercise of any other act of ownership, tended to decide whether the sale had been absolute or conditional. *Carpenter v. Bank*, 10 N.-East. Rep. (Ill.) 18.

CONSIDERATION. — A claim upon a judgment, made in good faith, is a good consideration for a promissory note, even though the judgment is in fact invalid. *Brown v. Ladd*, 10 N.-East. Rep. (Mass.) 839.

CONSTITUTIONAL LAW — AMENDING INDICTMENT. — *Ex parte Bain* (7 Supr. Ct. Rep. 781). The petitioner, Bain, was indicted for an offence against the laws of the United States. By order of court the indictment was slightly changed, by striking out what seemed to the court a superfluous clause. The trial proceeded and the prisoner was convicted. The prisoner now applies to this court for a writ of *habeas corpus*, on the ground that the change in the indictment renders the trial void. The petition was granted on the following grounds: The indictment can only be changed by the grand jury who framed it. If it is changed by order of the court or by the prosecuting attorney, it is no longer the indictment of the grand jury. The constitution of the United States provides that "no person shall be held to answer for a capital or infamous offence, unless on a presentment or indictment of a grand jury." This provision would be of little use if courts could change the indictment to suit the necessity of the case.

CONSTITUTIONAL LAW — "DUE PROCESS OF LAW." — A judgment *in personam* against a non-resident of a State is unconstitutional and invalid unless there has been a personal service of the writ within the State, or a voluntary appearance of the defendant. *Eliot v. McCormick*, 10 N.-East. Rep. (Mass.) 705.

CONSTITUTIONAL LAW — FORMER JEOPARDY. — An indictment for an offence against a city ordinance is no bar to an indictment under a State law, though the self-same act constitutes the offence in both cases. *Kemper v. Commonwealth*, 3 S.-W. Rep. (Ky.) 159. See 4 Cr. L. Mag. 79, for a valuable case on this point, and *id.* 496 for an article relating to it.

CONTRACT — PAROL EVIDENCE. — A receipt "in full of all demands" may, like any receipt, be contradicted by parol evidence that payment was not made as acknowledged; but the statement that the release was to be a discharge in full of all demands cannot be contradicted by parol evidence. *Cummings v. Baars*, 31 N.-W. Rep. (Minn.) 449.

CONTRACT FOR BENEFIT OF THIRD PARTY. — B agreed with C to furnish him such sums of money as might be necessary to pay C's current expenses; a creditor of C sued B upon this promise. It was held that though a third party for whose direct benefit a contract is made may sue upon it, and though such a person may be only one of a class, as a creditor, yet this principle gives no right to one who, as here, was only indirectly and incidentally to reap the benefit of the promise. *Burton v. Larkin*, 13 Pac. Rep. (Kas.) 398. See *Fisher v. Martin*, 25 N. Y. W'kly Dig. 539; and for a collection of cases on this right of the beneficiary, see 24 Cent. L. J. 112.

CONTRIBUTORY NEGLIGENCE — PASSENGER IN OPEN HORSE CAR. — If a passenger, at the invitation or with the consent of the conductor, stands up between the seats of an open horse-car, the seats all being occupied, and is thrown down and injured, in consequence of the rapid driving of the car around a curve, the passenger is not, as a matter of law, guilty of such contributory negligence as will prevent recovery. *Lapointe v. Middlesex R Co.*, 10 N.-East. Rep. (Mass.) 497.

CORPORATION — IMPLIED CONTRACT. — Where, in an action for a salary by a professor against the trustees of a college, the plaintiff shows that he has performed the services, expecting to be paid, and that he was advertised as a professor in the college catalogue, the corporation is liable for the value of the services, though the board passed no resolution authorizing his employment. *Tyler v. Trustees*, 13 Pac. Rep. (Or.) 329. "As against individuals the law implies a promise to pay in such cases, and the implication extends equally against corporations."

EASEMENT — NOTICE. — Where for a consideration A agreed with B, owner of adjoining property, in writing not recorded, that A should have the right to use the wall of B's building, and after A had erected a frame shop against B's wall, B's property passed by successive sales into C's hands, it was held that A could not replace the frame shop by a brick building, using the support of C's wall without compensation, the existence of the shop not being

sufficient notice to C of the contract. *Appeal of Heimbach*, 7 Atl. Rep. (Pa.) 737. But in *R. Co. v. Hay*, 10 N.-East. Rep. (Ill.) 29, it was held that where H contracted to sell C, a railroad company, a strip of land, and C occupied the land with track and a station, but no deed was ever given, and H then sold the land to the plaintiff, the title of the plaintiff was affected with the trust in favor of C, the use and occupation by C being sufficient notice.

**ELEVATED RAILROAD — COMPENSATION TO ABUTTORS.** — An elevated steam railroad in the streets of a city, of the kind usually constructed, is a diversion of the street from the use for which it was taken, and abutting owners may recover compensation for injury inflicted, including damage caused by emission of gas, smoke, dust, cinders, and other unwholesome substances. *Lohr v. Metrop. El. R. Co.* 10 N.-East. Rep. (N. Y.) 528, affirming the *Story Case*, 90 N. Y. 122.

**EQUITY JURISDICTION — ACCOUNTS.** — Even where a bill for an account will not properly lie, equity will take jurisdiction of complicated transactions; but the difficulty of adjusting the accounts is the basis of jurisdiction, and mutuality of accounts is an essential element only so far as it indicates complication and intricacy. *State v. Churchill*, 3 S.-W. Rep. (Ark.) 352.

**ESCROW — REVOCATION.** — A deed in escrow, to be delivered to the vendee on payment of purchase money, is not revocable, and the party holding it is bound to deliver on payment being offered. *Cannon v. Handley*, 13 Pac. Rep. (Cal.) 315. To the contrary effect, *Popp v. Swanke*, 31 N.-W. Rep. (Wis.) 916.

**ESTOPPEL — TITLE.** — If a party knowingly and without making known his own claim suffers another to purchase land and improve it at great expense under an erroneous opinion of title, the former will be estopped from asserting title thereafter against the latter. *State v. Graham*, 32 N.-W. Rep. (Neb.) 142.

**EVIDENCE — RES GESTA.** — Where the car started, while plaintiff was alighting, and threw her to the ground, statements made by the conductor while hastening to help her, were held not admissible as a part of the *res gesta*. *Williamson v. Cambridge R. Co.*, 10 N.-East. Rep. (Mass.) 790. See *Waliele v. R. Co.*, 95 N. Y. 274.

**HANDWRITING AS A TEST OF IDENTITY.** — Where it is sought to connect the identity of A and B, documents admitted or proved to have been written by B may be compared with documents proved to have been written by A, in order to establish that the two writers were one and the same person; and persons skilled in handwriting may give an opinion. *Bell v. Brewster*, 10 N.-East. Rep. (O.) In adverting to the instances in which this process was resorted to, the court omit to mention the Whitaker investigation, an account of which appeared in 2 Crim. Law Mag. 139. See 31 Sol. J. 405 (1887).

**HOMICIDE — CHARACTER OF DECEASED.** — Where, in an indictment for manslaughter, self-defence is an issue, testimony as to the violent character of the deceased is admissible. *State v. Downs*, 3 S.-W. Rep. (Mo.) 219. The view in this case has been adopted by almost all States, except Massachusetts (Wharton on Homicide, § 606 *et seq.*; 2 Cr. Law Mag. 78; 8 N. J. Law Journ. 215); though in the latter State the contrary rule has been weakened by the *Barnacle Case*, 134 Mass. 215.

**ILLEGAL CONTRACT — DEALING IN "FUTURES."** — If a contract to buy merchandise is speculative only, and no actual future delivery is intended, the contract is against public policy and void. *Beadles v. McElrath*, 3 S.-W. Rep. (Ky.) 152. See 3 Cr. L. Mag. 16.

**INDORSEMENT — COMPLETE UPON DELIVERY.** — Where an indorsement is written on a note by the payee in one State, and a sale and delivery is made in another State, the contract of indorsement is regarded as made in the State where the delivery occurred. *Briggs v. Latham*, 13 Pac. Rep. (Kas.) 393; see Ames' Bills and Notes, I. c. III. § 4, p. 273.

**LARCENY — *Lucri Causa*.** — In *Pence v. State*, 10 N. E. Rep. (Ind.) 919, it was held not larceny to take and burn a buggy with an intent "to get even" with the owner. This decision is *contra* to the latest English and a large proportion of the American authorities (collected in Whart. Cr. L. 9th Ed., §§ 895-899). It is there said that one who takes with an intent to enrich himself is morally more guilty than one who takes only to destroy; but it is hard to see why the latter is not the more villainous, as well as the more expensive to society, of the two.

**LIFE-TENANT — BETTERMENTS.** — A life-tenant, 28 years of age, is bound to pay the entire assessment for a granite pavement laid on an asphalt foundation, for this improvement is not, as to him, to be regarded as permanent beyond his probable life-time. *Reyburn v. Wallace*, 3 S.-W. Rep. (Mo.) 482.

**NEGLIGENCE — BLIND MAN.** — It is not, as a matter of law, negligence in a blind man to walk in the public thoroughfares unattended. *Smith v. Wildes*, 10 N.-East. Rep. (Mass.) 446.

**NEGLIGENCE — IDENTIFICATION OF PASSENGER WITH CARRIER.** — A decision rendered in January last (*The Bernina*, 12 P. D. 58-99) has at last overruled *Thorogood v. Bryan*, 8 C. B. 115, which held the much-censured doctrine that the negligence of the carrier is regarded as the negligence of the passenger so far as it prevents recovery against a third party, for the result of contributory negligence. Several American cases were examined, particularly *Little v. Hackett*, 116 U. S. 366, Lord Esher, M. R., prefacing his citation by saying that it was "interesting and profitable, as it always is, to consider the American cases."

**NOTICE — QUITCLAIM DEED.** — A grantee receiving a quitclaim deed takes with notice that the title is dubious and is not a purchaser for value without notice. *Richardson v. Levi*, 3 S.-W. Rep. (Tex.) 445.

**QUASI-CONTRACT — CONSTRUCTION OF STATUTE.** — Where a statute gives a remedy against the Commonwealth for claims "founded on contract," the term includes only obligations arising from contracts either express or implied in fact, and not obligations *quasi ex contractu* imposed by law. *Milford v. Commonwealth*, 10 N.-East. Rep. (Mass.) 516. See 77 N. Y. 144. This class of cases shows clearly the true nature of so-called contracts implied in law.

**SALE OF GOOD-WILL — IMPLIED AGREEMENT.** — The sale of the good-will of a business does not, in general, impart an agreement by the vendor not to engage again in a similar business within the limits of competition. *Semble*, that personal solicitation of old customers by the vendor would not be permissible. *Hoxie v. Chaney*, 10 N.-East. Rep. (Mass.) 713. *Pearson v. Pearson*, 27 Ch. Div. 145, has lately reopened this question in England, overruling *Labouchere v. Dawson*, L. R. 13 Eq. 322, and deciding in accordance with the *dictum* above. A recent case in Connecticut, *Cottrell v. Babcock Company*, 35 Alb. L. J. 129, reviews the decisions, and reaches the conclusion contrary to that of *Pearson v. Pearson*.

**SERVANT — LIABILITY OF MASTER FOR SERVANT'S ACTS.** — Where the driver of a horse-car gives up the reins to a substitute, and, in leaving the car to go to his meals, negligently knocks a passenger off the platform, it is an act done in the course of his employment, and the company is liable. *Commonwealth v. Brockton Street R. Co.*, 10 N.-East. Rep. (Mass.) 506.

**STATUTE OF FRAUDS — PERFORMANCE WITHIN A YEAR.** — A contract to furnish material until notified to stop is not within the Statute of Frauds. *Walker v. R. Co.*, 1 S.-East. Rep. (S. C.) 366. To the same effect is *Bullock v. Turnpike Co.*, 3 S.-W. Rep. (Ky.) 129.

**SUBROGATION.** — A judgment lien is extinguished at law upon payment of the judgment by a surety; yet in equity the lien continues in full force for the benefit of the surety. *Bank v. Fritz*, 32 N.-W. Rep. (Wis.) 123. See *Mann v. Bellis*, 4 Lanc. Law Rev. (Pa.) 162.

**SUBROGATION — CREDITOR OF MORTGAGOR.** — The sister of M, a mortgagor, paid off a portion of the mortgage, upon an agreement with her brother, but not with the mortgagee, that she should have an assignment of the mortgage when paid off. Before paying the balance she died. *Held*, that her estate was entitled to be subrogated to the mortgagee's rights to the extent of her payments. *Robertson v. Mowell*, 8 Atl. Rep. (Md.) 273. To the same effect, *Fievel v. Zuber*, 3 S.-W. Rep. (Tex.) 273. See *Flannary v. Utley*, 3 S.-W. Rep. (Ky.) 412.

**TAX ON DRUMMERS — CONSTITUTIONAL LAW.** — *Robbins v. Taxing Dist. of Shelby Co., Tenn.*, 7 Sup. Ct. Rep. 592, decides a very interesting point in constitutional law. A statute in Tennessee provided that all drummers selling goods by sample, in a certain district, should pay ten dollars a week, or twenty-five dollars a month, for such privilege. The question before the Supreme Court was the constitutionality of the above statute. *Held* by Bradley, J., in a very

clear opinion, that the above statute was an attempt by a State to regulate interstate commerce, and therefore unconstitutional, since Congress *alone* has the right to legislate on interstate commerce. The provision in question amounts to laying a tax on every order for goods obtained by a drummer. If States should be allowed to pass such laws it would cripple commerce.

Waite, C. J., Field and Gray, JJ., dissented. The dissenting view was that the act in question had nothing to do with interstate commerce, inasmuch as the tax was simply imposed on a business carried on primarily within the State, its interstate character being accidental and immaterial for the purposes of the tax.

A similar statute in Maryland was decided unconstitutional for the same reasons. *Corson v. Maryland*, 7 Sup. Ct. Rep. 655.

TELEGRAM—LIMIT OF LIABILITY.—A limitation of liability for telegraphic messages sent at night is invalid, so far as damage caused by the company's negligence is concerned, even though the company offers to insure all loss upon prepayment of a premium of one per cent. on the agreed amount of risk. *Marr v. W. U. Tel. Co.* 3 S.-W. Rep. (Tenn.) 497. See *Grinnell v. W. U. Tel. Co.* 113 Mass. 299.

TROVER—WHAT IS CONVERSION.—A and B purchase the growing crops of grass on two adjoining pieces of land, the line between not being marked. C, A's servant, while cutting A's grass, in ignorance of the boundary, cut part of the grass sold to B; C left the grass as it was cut. It was subsequently removed by other servants of A. Held, C was liable to B for a conversion. *Donahue v. Shippee*, 8 Atl. Rep. (R. I.) 541. Admitting that C's act was a dealing with property in assertion of title in another than the owner, it is, to say the least, difficult to see how C's act was anything more than a changing of realty into personalty,—a trespass to realty. If he had by the same act removed the grass, he would not have been guilty of larceny at common law.

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## REVIEWS.

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COMMENTARIES ON THE LAW OF CONTRACTS. By Joel Prentiss Bishop, LL.D. Chicago: T. H. Flood & Co. 8vo. 780 p.

This book bears testimony on every page that the author gave to its preparation that painstaking investigation which is so characteristic of all his publications. The author has attempted to cover the entire subject of contracts in a volume of six hundred pages. We think the general feeling will be that the profession has lost in consequence of too great condensation.

Mr. Bishop has the great merit of not being led astray by fictions. Chapter VIII., dealing with "Contracts created by Law," affords a good illustration of this. And in pointing out, in § 908, that there is no propriety in speaking of an infant being liable, on his express contract, to pay for necessities, when in fact he is required to pay, not the contract price, but the value of the necessities, the author shows the same disregard for the fictions of writers that he does for those of the law.

The book will be found exceedingly useful in practice, and should be added to the library of every practising lawyer. W. A. K.

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THE LAW OF PRIVATE CORPORATIONS. By Victor Morawetz. Second edition. Boston: Little, Brown, & Co. 8vo. v. and 1102 pages.

This deservedly successful book now appears in two volumes. From an artistic point of view, as its author would doubtless be the first to

admit, the work has lost rather than gained by this expansion. It is possible that the increase in volume will be welcomed by the practitioner. The additions are marked by the readableness, clearness of statement, and accuracy of citation that contributed so largely to the value of the original book. There is also the same independence of judgment, as refreshing as it is rare in the text-books of the day. The discussion, for instance, in § 197 of the decision in *Fisher v. Essex Bank*, 5 Gray, 373, by which an unregistered transferee of shares was postponed to a subsequently attaching creditor, is an excellent illustration of judicious criticism. As he tells us in the preface, the author has not found it necessary to change his views upon any important question. We should have been glad to see some modification of his fundamental conception of the nature of a corporation, for that conception occasionally leads him astray. In § 787, for example, the directors of an insolvent corporation are said to stand in a fiduciary relation to its creditors, having previously been fiduciaries of the corporation itself; and, again, in § 803, the doctrine that an insolvent corporation may make preferences among its creditors is vigorously assailed. We cannot agree with the proposition in the one case or with the criticism in the other. There is no direct relation between the directors and the creditors of a corporation. The directors are at all times fiduciaries of the corporation, and of that alone, as was clearly pointed out by Jessel, M. R., in *Pool's Case*, 9 Ch. Div. 322, 328. Nor is there any reason for discriminating between an insolvent corporation and an insolvent individual in the matter of preferring favored creditors. We think preferences by either should be prohibited by legislation. But in the absence of legislation a corporation may deal as freely with its assets as an individual. The assets of a corporation, solvent or insolvent, are no more a trust fund for its creditors than the property of an individual is a trust fund for his creditors. In the main, however, the difference between the commonly accepted conception of a corporation and that of our author is of speculative rather than of practical importance. We cannot refrain from expressing our satisfaction that this book, which is generally conceded to be the best treatise upon the subject of Corporations, is the work of a graduate of this school.

J. B. A.

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## A BRIEF SURVEY OF EQUITY JURISDICTION.<sup>1</sup>

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### II.

IT is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term "relief" is commonly used instead of "remedy;" and, though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the reme-

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<sup>1</sup> Continued from page 72.

dies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both.

Actions are either *in personam* or *in rem*. Actions *in personam* are founded upon torts, actual or threatened, or upon breaches of personal obligations, actual or threatened. They are called *in personam* because they give relief only against the defendant personally, *i. e.*, the plaintiff has no claim to or against any *res*. Actions *in rem* are founded upon breaches of real obligations, or upon the ownership of corporeal things, movable or immovable. Actions founded upon breaches of real obligations are called *in rem*, because they give relief only against a *res*. Actions founded upon the ownership of corporeal things are called *in rem*, because the only relief given in such actions is the possession of the things themselves. Actions *in rem*, as well as actions *in personam*, are (except in admiralty) in form against a person. The person, however, against whom an action *in personam* is brought, is fixed and determined by law; namely, the person who incurred (and consequently the person who broke or threatened to break) the obligation, or the person who committed or threatened to commit the tort, while the person against whom an action *in rem* is brought is any person who happens to be in possession of the *res*, and who resists the plaintiff's claim. The relief given in actions *in personam* may be either the prevention or the specific reparation of the tort or of the breach of obligation, or a compensation in money for the tort or for the breach of obligation. The relief given in an action *in rem*, founded on the breach of a real obligation, is properly the sale of the *res*, and the discharge of the obligation out of the proceeds of the sale. The relief given in an action *in rem*, founded on the ownership of a corporeal *res*, is the recovery of the possession of the *res* itself by the plaintiff.

Actions *in rem* founded upon ownership are anomalous. As every violation of a right is either a tort or a breach of obligation, it would naturally be supposed that every action would be founded upon a tort or breach of obligation, actual or threatened; and if this were so, the only actions *in rem* would be those founded upon breaches of real obligations. But when a right consists in the ownership of a corporeal thing, a violation of that right may consist in depriving the owner of the possession (and consequently of the use and enjoyment) of the thing. If such a tort had the



effect of destroying the owner's right, as the physical destruction of the thing would, it would not differ from other torts in respect to its remedy; for the tort-feasor would then become the owner of the thing, and its former owner would recover its value in money as a compensation for the tort. And by our law, in case of movable things, the tort often has the effect practically of destroying the owner's right, sometimes at his own election, sometimes at the election of the tort-feasor. But, subject to that exception, the tort leaves the right of the owner untouched, the thing still belonging to him. He can, indeed, bring an action for the tort, and recover a compensation in money for the injury that he has suffered down to the time of bringing the action;<sup>1</sup> but the compensation will not include the value of the thing, as the thing has not, in legal contemplation, been lost. If, therefore, an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury which he would eventually suffer. But, as the law abhors a multiplicity of actions, it always enables the owner to obtain complete justice by a single action, or at most by two actions. Thus, it either enables him to recover the value of the thing in an action for the tort, by making the tort-feasor a purchaser of the thing at such a price as a jury shall assess, or it enables him to recover the possession of the thing itself in an action *in rem*. He is, however, further entitled to recover the value of the use and enjoyment of the thing during the time that the defendant has deprived him of its possession, together with compensation for any injury which the thing itself may have suffered while in the defendant's possession; and this he recovers, sometimes in the same action in which he recovers the thing itself or its value, and sometimes in a separate action.

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<sup>1</sup> The reader should be reminded, however, that by our law an owner of immovable property who has been dispossessed (*i.e.*, disseised) of it, can recover damages in an action of tort only for the original dispossession; he cannot recover damages for the subsequent detention of the property until he has recovered its possession. The reason is, that a loss of the possession or seisin of immovable property is technically a loss of the ownership, and the acquisition of possession or seisin is an acquisition of ownership, though it may be wrongful. Hence, a disseisor ceases to be a trespasser the moment his disseisin is completed. When, however, the original owner recovers back his lost seisin, his recovered seisin relates back to the time of the disseisin, the law treating him as having been in possession all the time. Hence, he can then recover damages for the wrongful detention of the property.

It seems, therefore, that an action *in rem*, founded upon ownership, may be regarded as a substitute for an infinite or an indefinite number of actions founded upon the tort of depriving the plaintiff of the possession of the *res*, which is the subject of the action ; and that such an action may, therefore, be regarded as in a large sense founded upon the tort just referred to, and the recovery of the thing itself as a specific reparation of that tort.

Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit ; *i. e.*, that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate,—not to each separately. Thus, in English-speaking countries there are no less than three systems of substantive law in force, each of which has a remedial system of its own ; namely, the common law, the canon law, and admiralty law. There is also a fourth system of remedial law, namely, equity. What has been said, therefore, of actions and remedies applies to all of these systems in the aggregate.

It follows, therefore, that in English-speaking countries civil jurisdiction is parcelled out among the four systems just referred to ; and it is the chief object of this paper to ascertain what portion of this jurisdiction belongs to equity, and for what reasons.

But here an important question arises as to the nature of equity jurisdiction. If we have three systems of substantive law, each exercising jurisdiction over those rights which are of its own creation, and if equity is a system of remedial law only, how does it happen that equity has any jurisdiction ? Do not the other three systems divide among themselves the entire field of jurisdiction, and how then is there any room for equity ? The answer is that the term "jurisdiction," as applied to equity, has a very different meaning from what it has as applied to courts of law ; and the failure to recognize that fact has caused much confusion of ideas. As applied to courts of law, the term is used in its primary and proper sense ; as applied to equity, it is used in a secondary and improper sense. For example, when two courts of law, created by the same sovereign, are independent of each other, the jurisdiction of each is either exclusive of the other, or concurrent with it, or it

is partly exclusive and partly concurrent. If one invades a province which belongs exclusively to the other, it acts without right (if not without power), and ought to be restrained by the common sovereign. If a particular province belongs to them both (*i.e.*, if they have concurrent jurisdiction over it), each is entitled to enter it, while neither is entitled to interfere with the other; and hence questions of priority are liable to arise between them, *i. e.*, questions as to which of them first obtained jurisdiction over given controversies. But the terms "concurrent" and "exclusive" have no proper application to equity, or rather they do not correctly describe the relations between equity and the other three systems. On the one hand, equity never excludes either of the other systems. It is true that equity alone exercises jurisdiction over equitable rights; but that is not because equity claims any monopoly of such jurisdiction,—it is because the other systems decline to exercise it, they not recognizing equitable rights. On the other hand, equity is never excluded by either of the other systems; and hence equity exercises jurisdiction over legal rights (as well as over equitable rights) without any external restraint. Since, however, one or more of the other systems has jurisdiction over every legal right, the jurisdiction of equity over legal rights is in a certain sense concurrent, but never in any proper sense; and not unfrequently it is in fact exclusive in the sense of being the only jurisdiction that is actually exercised. It is not properly concurrent, because there is no competition between the two jurisdictions. Courts of law act just as they would act if equity had no existence, just as in fact they did act before equity had any existence. Nor does equity ever complain of their so acting, or seek to put any restraint upon their action, or question the validity and legality of their acts; and yet equity acts with the same freedom from restraint, even when dealing with legal rights, that courts of law do when dealing with rights of their own creation.

What has thus far been said, however, is calculated rather to stimulate than to satisfy inquiry. How is it that equity has the power to invade at will the provinces of other courts? What object has equity in assuming jurisdiction over rights which it is the special province of other courts to protect? What is the extent of that jurisdiction? The answer to the first of these questions will be found in the fact that the jurisdiction of equity is a prerogative jurisdiction; *i. e.*, it is exercised in legal contemplation by

the sovereign, who is the fountain from which all justice flows, and from whom, therefore, all courts derive their jurisdiction. The answer to the second question is that the object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford. The answer to the third question is that the jurisdiction is co-extensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted. But then the question arises, How does it happen that the protection afforded by courts of law to legal rights is insufficient and inadequate, and how is it that equity is able to supply their short-comings? The answer to these questions, so far as regards the largest and most important part of the jurisdiction exercised by equity over legal rights (namely, that exercised over common law rights), will be found chiefly in the different methods of protecting rights employed by courts of common law and courts of equity respectively, *i. e.*, in the different methods of compulsion or coercion employed by them.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former, the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff. By the latter, the defendant's title to the property seized is transferred to the plaintiff, or his title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession, on the ground that the property belongs to the plaintiff,

and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for the recovery of money, the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find ; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judgment ; but his body is taken (as his property is) in satisfaction of the judgment.

Nor is our common law peculiar in its method of protecting rights ; for the same method substantially is and always has been employed in most other systems of law with which we are acquainted. *Nemo potest præcise cogi ad factum* was a maxim of the Roman law, and it has been adhered to in those countries whose systems of law are founded upon the Roman law.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected ; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing ; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing ; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment ; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they could not touch their bodies nor their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them into the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de excommunicato capiendo*), and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such* done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of the common law; for the former is strong at the very points where the latter is weak.

It has been said that the extent of the jurisdiction exercised by equity over common-law rights is measured by the requirements of justice. But what are the requirements of justice? In order to answer that question we must first know definitely in what particulars the common law fails to give to common-law rights all the protection which it is possible to give, and which, therefore, ought

to be given ; and we shall have taken an important step in that direction if we classify all the remedies furnished by the common law, and compare them with the classification before made of judicial remedies generally.

Common-law actions, like actions generally, are either *in personam* or *in rem*. Common-law actions *in personam* are founded upon the actual commission of a common-law tort or the actual breach of a common-law personal obligation. Common-law actions *in rem* are founded upon the ownership of corporeal things, movable or immovable. The relief given in a common-law action *in personam* is always the same ; namely, a compensation in money for the tort or the breach of obligation, the amount of which is ascertained or assessed by a jury under the name of damages.<sup>1</sup> The relief given in common-law actions *in rem* is also always the same, namely, the recovery of the *res* ; but, then, it is to be borne in mind that the only action strictly *in rem* that lies for a movable *res* is the very peculiar action of replevin ; and, when that action cannot be brought, the only available actions are trover, in which the value of the *res* in money can alone be recovered, and detinue, in which either the *res* itself or its value in money is recovered, at the option of the defendant. Indeed, as has been already seen, the common law has not generally the means of enabling a plaintiff to recover the possession of a movable *res* against the will of the defendant. In replevin that object is accomplished by dispossessing the defendant of the *res*, and placing the same in the plaintiff's possession, at the very commencement of the action ; but that would be obviously improper except when the defendant has acquired the possession of the *res* by dispossessing the plaintiff of it. The obstacle in the way of recovering possession of the *res* itself in an action of detinue does not arise from the nature of the action, but from the common-law mode of

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<sup>1</sup> Our law regards a debt as a specific thing belonging to the creditor and in possession of the debtor ; and hence the remedy specially provided for the breach of an obligation to pay a debt, namely, the action of debt, is technically an action *in rem*. Sometimes this is the only remedy ; but in most cases the creditor has an election between an action of debt, founded upon the debt itself, and an action of assumpsit or covenant, founded upon the contract by which the debt was created. In the former action, the judgment is that the plaintiff recover the debt itself as a specific thing ; in the two latter, the judgment is that the plaintiff recover damages for the detention of the debt. Still, this is only a technical distinction, for the same amount is recovered either way, and the mode of enforcing the judgment is the same.

enforcing a judgment. Detinue is in its nature an action purely *in rem*; and it only ceased to be so in practice because a judgment *in rem* was found to be wholly ineffective; and consequently a judgment was rendered in the alternative, namely, for the recovery of the *res* itself or its value in money.

If, now, we compare the foregoing common-law remedies with the scheme of remedies generally, as previously given, we find that the common law does not attempt (as indeed it could not) to prevent either the commission of a tort or the breach of an obligation; nor does it attempt to give a specific reparation for either, except so far as the recovery of the *res* in an action *in rem* may be so considered; nor does it give any action whatever for the breach of a real obligation; nor does it enable the owner of movable things to recover the possession of them when wrongfully detained from him, except in those cases in which replevin will lie. Of these four defects in common-law remedies, the first two are the most conspicuous; and it is chiefly for the purpose of supplying those two defects that equity has assumed jurisdiction over torts (*i.e.*, legal torts) and over contracts, — the two largest and most important branches of the jurisdiction exercised by equity over legal rights. The jurisdiction over torts has been assumed chiefly for the purpose of supplying a remedy by way of prevention; that over contracts for the purpose of supplying a remedy by way of specific reparation. The former is commonly treated of under the head of Injunction; the latter, under the head of Specific Performance.

The mode of giving relief in equity is not only peculiarly adapted to the purpose of preventing the commission of wrongful acts, but it is the only mode in which such a remedy is possible. No mode of giving relief is, however, alone sufficient to make such a remedy effective; for relief cannot be given until the end of a suit, *i.e.*, until the question of the plaintiff's right to relief has been tried and decided in the plaintiff's favor; and, long before that time can arrive, the wrongful act may be committed, and so prevention made impossible. If, therefore, a court would prevent the doing of an act, it is indispensable that it interpose its authority, not only before any trial of the question of the defendant's right to do the act, but at the very commencement of the suit, and frequently without any previous notice to the defendant; and accordingly equity does so interpose its authority by granting an



injunction against the doing of the act until the question is tried and decided. Such an injunction is called a temporary injunction, and is not technically relief. If the question is finally decided in the plaintiff's favor, the injunction is then made perpetual, and becomes relief.

Upon the whole, therefore, the equitable remedy by way of prevention is as effective as such a remedy can possibly be made; and it is also as effective and as easily administered as any remedy in equity is. Moreover, the remedy by way of prevention, if it does not come too late, is always the easiest, as well as the best, remedy that equity can give in case of a tort; and, therefore, it is never an answer to a bill for an injunction to prevent the commission of a tort, that the tort, if committed, can be specifically repaired by the defendant; and the only question of jurisdiction that such a bill can ever raise is this: Will more perfect justice be done by preventing the tort than by leaving the plaintiff to his remedy at law? This, however, is a very complex question, depending partly upon the nature of the tort, and partly upon other considerations. In respect to the nature of the tort, also, there are several distinctions to be taken. For example, some torts cause no specific injury; others cause injury which, though it is specific, can be specifically repaired by the person injured; others cause injury which, though specific and incapable of specific reparation, can be fully paid for in money. On the other hand, a tort may cause an injury which is specific, and which cannot be specifically repaired (or can be specifically repaired only by the tort-feasor), and which cannot be fully paid for in money. So, too, the injury caused by a tort, though not specific, or though capable of being specifically repaired by the person injured, or though capable of being fully paid for in money, yet is of such a nature that it is impossible to ascertain or estimate its extent with any accuracy. Whenever, therefore, a tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, *or* an injury the extent of which it is impossible to ascertain or estimate with any accuracy, there is a *prima facie* case for the interference of equity to prevent the commission of the tort; otherwise the remedy at law is adequate so far as regards the nature of the tort. If a plaintiff make out a *prima facie* case in one of the two ways just indicated, he will be entitled to the interference of equity unless the defendant can show

that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. If the defendant can show *that*, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price.

It must be confessed, however, that the foregoing distinctions, though, it is conceived, they will throw much light upon the jurisdiction actually exercised, will not fully account for it, either affirmatively or negatively, even when it depends wholly upon the nature of the tort. Questions of jurisdiction do not receive the same careful and constant attention which is bestowed upon questions of substantive right; and therefore, in dealing with such questions, the elements of haste, accident, caprice, the habits of lawyers, the leanings of individual judges, and the ever-changing temper of public opinion, have been factors of no inconsiderable importance. The jurisdiction of equity over torts in particular has grown up by slow, almost imperceptible degrees; and the jurisdiction exercised over one class of torts has often had little influence upon the exercise of jurisdiction over other and analogous classes of torts.

It becomes necessary, therefore, to inquire briefly into the jurisdiction actually exercised by equity over different classes of torts. There are two large and important classes of torts over which equity practically assumes no jurisdiction whatever, namely, torts to the person and to movable property. Its jurisdiction, therefore, is substantially limited to torts, to immovable property, and to incorporeal property. Torts to immovable property are waste, trespass, and nuisance. Torts to incorporeal property may, it seems, all be classed as nuisances, though it is usual to treat torts to certain lawful monopolies, not relating to land (*e. g.*, patent-rights and copy-rights), as constituting a class by themselves under the name of infringements of the rights violated.

Waste is a tort committed by the owner of a particular estate in land, the person injured being the remainder-man or reversioner. It is, therefore, a tort to the land, committed by a person in possession of the land, and whose possession is rightful, against a

person who has neither the possession nor the right of possession. Hence, it is not a trespass, the essence of which is always a wrongful entry, and which is always an injury to the possession. It always consists in injuring or destroying something upon the land which belongs to the owner of the fee.

A nuisance to land is any injury to it which is committed without making an entry upon the land, and which, for that reason, is not a trespass. Any injury to incorporeal property is a nuisance, as a trespass can be committed only against corporeal things. Therefore, an act which would be a trespass to a corporeal thing will be only a nuisance to an incorporeal thing. For example, an obstruction by A of a right of way which B has over the land of C, is a trespass to C, but only a nuisance to B.

Over all the foregoing torts, namely, waste, trespass to land, and nuisance either to land or to incorporeal property (including infringements of such lawful monopolies as patents and copyrights), equity exercises a jurisdiction of greater or less extent; and it may be stated as a general rule, that, whenever the injury caused by a tort belonging to either of these classes will be of a serious and permanent character, equity will interfere to prevent it; but that for injuries which are only technical, or slight, or temporary, or occasional, the person injured will be left to his remedy at law. Thus, the injury caused by waste is necessarily permanent, being an injury to the inheritance; and in the great majority of cases the injury is of a substantial character. Accordingly, equity interferes to prevent waste almost as of course. If, however, the acts complained of, though technically waste, do not in fact injure the land,—still more, if they actually improve it,—the remainderman or reversioner will be left to his remedy at law.

Acts which will constitute waste when committed by the owner of a particular estate, will, of course, be (not waste, but) trespass when committed by a stranger; but such acts clearly ought to be prevented equally in either case. Accordingly, the rule now is, that equity will interfere to prevent destructive trespass to land, or trespass in the nature of waste; but it will not interfere to prevent trespasses which injure only the present possession; and, indeed, the first instance in which equity interfered to prevent destructive trespass was in the time of Lord Thurlow.<sup>1</sup>

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<sup>1</sup> *Flamang's case*, cited in *Mitchell v. Dors*, 6 Ves. 147, in *Hanson v. Gardiner*, 7 Ves. 305, 308, in *Smith v. Collyer*, 8 Ves. 89, and in *Thomas v. Oakley*, 18 Ves. 184, 186.

In cases of waste there is seldom any controversy about the title to the land. Acts in the nature of waste, however, frequently raise questions of title; for such acts may be committed by a person who claims to own the land, but whose title is denied by another person who also claims to own the land; and in such a case either of the adverse claimants may be in possession. If the acts be committed by the one out of possession, he can always successfully defend an action of trespass by showing that the land is his. If the acts be committed by the one who is in possession, the one out of possession has no remedy at law, except an action of ejectment to recover the land itself. If he succeed in ejectment, and recover possession of the land, the other's acts will then (but not till then) become trespasses by relation, and damages may be recovered for them. How, then, will equity deal with such a case, if applied to by either of the claimants to prevent acts of the other in the nature of waste? The chief difficulty arises from the fact that the trial of the title does not belong to equity. Each claimant has a right to have the title tried at law and by a jury. Equity will not, therefore, interfere with the trial of the title. What will it do? If the plaintiff in equity is in possession there is no serious difficulty. Equity will entertain a bill, as in other cases, and will grant a temporary injunction; but the injunction will not be made perpetual until the plaintiff has recovered in an action of trespass; and if the plaintiff fail to bring such an action promptly, or to prosecute it with diligence, the injunction will be dissolved on the defendant's application. So, if the action be defended successfully, the bill in equity will be dismissed. If a temporary injunction be obtained before any trespass has been committed, of course the plaintiff in equity cannot maintain trespass upon the actual facts; but equity will get over that difficulty by directing the plaintiff to bring his action, and to declare in the usual form, and by directing the defendant not to traverse the declaration, but to plead only his affirmative defence of title.

When the plaintiff in equity is out of possession the difficulty is much greater. The acts of the defendant are not then trespasses, or torts of any kind, until made so by fictitious relation. How, then, can equity grant an injunction against acts which confessedly, upon the facts before the court, are not wrongful? Our law may be open to criticism for making no provision (except such as is made by the statutes against forcible entry and detainer) for

trying questions of possession in a summary way ; but equity is not a lawgiver. Moreover, if equity is to interfere in such a case, it must, it seems, either strictly limit its interference to the granting of an injunction during the pendency of an ejectment, or it must take the entire litigation into its own hands, assuming control of the action of ejectment, if one has been already brought, or directing one to be brought and prosecuted under its control ; and either of these courses is open to serious objection. In point of authority courts of equity have almost invariably refused to interfere in such cases, though several judges have expressed surprise and regret that the jurisdiction had not been exercised ; and intimations have been thrown out that it would be exercised whenever a sufficiently strong case should be presented. In one case, also, a temporary injunction was granted ; but the facts sworn to were very strong, and the defendant, though served with notice, did not appear to oppose the motion.<sup>1</sup>

As nuisances consist, for the most part, in so using one's own land as to injure the land or some incorporeal right of one's neighbor, it follows that the injuries caused by nuisances are generally more or less permanent ; and, hence, they not unfrequently call for the interference of equity to prevent them. Yet such interference has been found to be attended with great difficulties. An act which is wrongful in itself may be adjudged wrongful before it is committed as well as afterwards ; nor is there any question as to the extent of the wrongfulness, for the entire act is wrongful. But an act which is in itself rightful, and which is wrongful only because of some effect which it produces, or some consequence which follows from it, can seldom be proved to be wrongful by *a priori* reasoning, or otherwise than by actual experience ; and even when it does sufficiently appear that a given act done in a given way will be wrongful, it does not follow that some part of it may not be rightfully done, or even that the entire act may not be done in such a way as to be rightful. For these and similar reasons a court of equity frequently finds it impossible to interfere in case of a nuisance until the act which constitutes the nuisance is either fully completed, or at least far advanced towards completion ; and, in either of the latter events, it will often be found that the damage to the defendant which the interference of the court

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<sup>1</sup> Neale v. Cripps, 4 K. & John. 472.

will cause will be out of all proportion to the damage to the plaintiff which it will prevent.

A distinction must be taken, however, between things erected or constructed on one's own land which are in themselves a nuisance to one's neighbor, and those which are so only because of the uses to which they are put; for, in cases belonging to the latter class, there may be no occasion for equity to interfere until injury is actually caused, nor is it ever too late to prevent a nuisance for the future without causing anything to be undone.

So, too, when a nuisance is caused by the carrying on of an offensive trade, equity finds no especial difficulty in interfering, unless expensive works have been constructed for the express purpose of carrying on that trade, and which the abandonment or removal of the trade will render wholly or nearly worthless.

The most difficult of all nuisances for a court of equity to deal with are those caused by the erection of massive and costly buildings in large cities. In such cases, if there is danger of a wrong being done, and yet the court does not see its way to granting an injunction, a convenient course is for the court to require the building to be constructed under its own supervision, by directing the defendant to lay his plans before the court, and obtain its approval of them before proceeding.<sup>1</sup>

The interference of equity to prevent the infringement of patents and copyrights is attended with none of the peculiar difficulties which so often occur in cases of ordinary nuisance; and, though a single infringement does not of itself produce any permanent injury, yet the example of successful infringement is contagious and pernicious; and, as it is extremely difficult to prove the extent of the infringement, and so the remedy at law is very inadequate, equity interferes by way of prevention as a matter of course.

Such are the cases in which equity will interfere for the prevention of a tort on account of the nature of the tort, or of the injury caused by it; but there are other cases in which it interferes for a wholly different reason, namely, to prevent the necessity of bringing a great or indefinite number of actions. Thus, if A commit a tort against B, which is capable of indefinite repetition, and B bring an action and recover damages, and A persist notwithstanding in committing the tort, a court of equity will entertain a

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<sup>1</sup> *Stokes v. City Offices Co.*, 2 H. & M. 650.

bill for an injunction ; for otherwise B might have to bring an indefinite number of actions. If, indeed, there be a question of right involved between A and B, equity will not necessarily interfere after a single trial at law, but it will interfere as soon as it thinks the right has been sufficiently tried. So if many persons are severally committing, or threatening to commit, similar torts against one, and each tort involves the same questions, both of fact and law, as every other, the one may file a bill against the many (or against a few of them on behalf of themselves and all the others), and obtain an injunction ; for otherwise he would have to bring a separate action at law against each. So, too, if one person is committing, or threatening to commit, torts against each of many others, each tort involving the same questions of fact and law as every other, the many (or a few of them representing themselves and all the others) may file a bill against the one, and obtain an injunction ; for otherwise each of them would have to bring an action against him. In such cases the bill is commonly called a bill of peace.

When a court of equity is applied to for a remedy by way of prevention, the defendant may have already begun the commission of the acts of which a prevention is sought, or the plaintiff's case may be merely that the defendant will commit them unless prevented by an injunction. In the latter event the plaintiff may encounter a difficulty in the way of proof ; for a court of equity cannot interfere to prevent the commission of an act, however wrongful, merely because the defendant is liable to commit it, nor even because other people think he will commit it ; it must be satisfied that he intends to commit it. And yet an intention to commit a wrongful act is apt to be one of the most difficult things to prove, as a person who has such an intention is not likely to proclaim it beforehand by words or deeds ; and yet these are the only means by which the intention can be proved.

If the remedy by way of prevention is not made effective until the commission of the acts sought to be prevented has been begun, the plaintiff, of course, needs a double remedy ; namely, prevention as to the future, and specific reparation or a compensation in money for the past. If it is a case in which equity can and will compel specific reparation, of course the plaintiff will obtain complete relief in equity, both as to the past and as to the future. But how will it be if (as commonly happens) the plaintiff can have

only a compensation in money for the past? On the one hand, equity will not entertain a bill for the mere purpose of giving a compensation in money for a past tort; and this for two reasons, — namely, first, the remedy at law is perfectly effective; secondly, equity cannot assess damages. On the other hand, if equity does not give relief for the past tort in the case supposed, the burden of two suits will be imposed upon the parties. To avoid this evil, therefore, equity will give relief for the past tort if the plaintiff will accept such relief as equity can give. It is, indeed, possible for equity to give relief for a past tort by way of damages; but it can only do so by sending the case to a court of law for an assessment of damages, and that is quite as objectionable as a separate action. If, however, the tort be one by which the defendant obtains a direct and immediate profit, equity can and will compel him to account with the plaintiff for such profit; and this relief is commonly preferred to an action for damages. Accordingly, in cases of waste, destructive trespass, and infringement of patents and copyrights, it is the constant practice for the plaintiff to pray for an account as well as an injunction. In cases of nuisance, however, an account is seldom asked for, as there are seldom any profits sufficiently direct and immediate to be accounted for.

The next question is, In what cases will equity compel the specific reparation of torts already committed? This question can arise, of course, only in reference to such torts as are in their nature capable of being specifically repaired; and it does not often arise, except in reference to torts committed by the defendant on his own land (*i.e.*, nuisances); for in other cases the plaintiff may generally as well recover damages of the defendant, and then repair the tort himself.

It must be confessed that the ordinary mode of giving relief in equity is not as well adapted to specific reparation as it is to prevention. It is scarcely possible, in the nature of things, for a court successfully to compel the performance of specific affirmative acts, unless they be of a very precise and definite character, such, for example, as paying money, producing documents, delivering possession of property, and executing conveyances of property; and clearly a court ought to be very cautious about attempting what it cannot successfully carry out. It is singular, therefore, that courts of equity have confined themselves so exclusively to their favorite mode of giving relief. In cases where



the title to property is to be affected, no other mode is open to them ; but, in cases which involve only the exercise of physical power, courts of equity have all the resources which it is possible for any court to have. When, therefore, justice requires that a tort should be specifically repaired, it would seem to be much more feasible for a court of equity itself to undertake the repair of it, at the expense of the tort-feasor, than to attempt to compel the latter to repair it. For example, specific reparation in the case of a nuisance is an abatement of the nuisance ; and there seems to be no good reason why a court of equity should not abate a nuisance, if justice require its abatement. The ancient common law regarded abatement as the proper remedy for a nuisance ; and though damages alone can be recovered at law at the present day, that may be only because the actions anciently provided have been superseded by the action on the case.

Courts of equity have shown little disposition, however, to try new modes of giving relief ; and hence they seldom attempt to give a remedy for a tort by way of specific reparation. There is believed to be but one instance (and that an ancient one) in cases of waste,<sup>1</sup> no instance in cases of trespass, and but few instances in cases of nuisance,<sup>2</sup> in which an English court of equity has attempted to give such a remedy.

Moreover, notwithstanding what has been said in favor of the abatement of nuisances, it is undoubtedly true that such a jurisdiction should be exercised in modern times with great caution. In many cases of nuisance there is no reason for imputing any intentional wrong to the defendant ; and it must not be forgotten that the rights of the latter are as sacred as those of the plaintiff ; and, if courts of equity find insuperable difficulties in the way of arresting an expensive work when near completion, much more will they find insuperable difficulties in the way of pulling it down when completed. The mere cost of abating such a nuisance may

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<sup>1</sup> *Vane v. Lord Barnard*, 2 Vern. 738 ; S. C. *nom.* *Lord Barnard's case*, Ch. Prec., 454 (the case of Raby Castle). According to the report in *Vernon* the decree directed the master to see the castle repaired at the defendant's expense. Whether the decree was ever performed or not does not appear. It is said not to have been performed during the defendant's life. See *Rolt v. Lord Somerville*, 2 Eq. Cas. Abr. 759.

<sup>2</sup> The first instance was in the case of *Robinson v. Lord Byron*, 1 Bro. C.C. (Belt's ed.) 588, 2 Cox, 4, Dickens, 703. Then followed *Lane v. Newdigate*, 10 Ves. 192, and *Blakemore v. Glamorganshire Canal Co.* 1 M. & K. 154. In very recent times instances of such relief have been much more common.

easily exceed in amount the damage which will be caused to the person injured by its being suffered to remain. Upon the whole, therefore, it cannot be expected that a court of equity will ever make a decree that a costly building, which has been completed, be pulled down ; and, if such a decree shall ever be made, there is little likelihood that it will be executed.

There is, however, an obstacle in the way of obtaining a remedy at law for a permanent nuisance, which has not yet been adverted to. Such a nuisance is a continuing tort, *i. e.*, it is a new tort every moment ; and the only damages that can be recovered for such a tort are such as have been already suffered ; and hence the person injured, if he would obtain full indemnity, must sue periodically so long as the tort continues. Moreover, if he lets too long a time elapse without suing, the tort-feasor may acquire a prescriptive right to continue what was at first a tort. If, therefore, a permanent nuisance has been erected, and it cannot be abated, justice would seem to require that the person injured by it should at least recover at once, and by a single action, a full compensation in money for the injury, and this measure of justice equity may, it seems, grant ; for, though equity cannot itself assess damages, yet it may have the full amount of the damages which will be caused by the nuisance assessed by means of a feigned issue, and it may then make a decree that the defendant pay the damages so assessed ; and if the defendant, having paid these damages, shall be afterwards sued at law, he may obtain an injunction against the prosecution of the action.

It is well known that every tort as such dies with the person committing it ; and therefore no action at law founded strictly upon a tort ever lies against an executor or administrator as such, or against an heir as such. If, however, the deceased tort-feasor has been enriched by his tort, and his ill-gotten gains have gone to his representatives, justice clearly requires that the latter should restore them to the person injured ; and accordingly they may be recovered by an action at law, if there be an action, not founded upon the tort, which is adapted to the circumstances of the case. Thus, if a tort-feasor have converted the fruits of his tort into money, an action for money had and received will lie against his executor or administrator. So if the tort consisted in wrongfully taking or detaining property, and the property so wrongfully taken or detained has gone to the executor or administrator, or to the

heir (as the case may be) of the tort-feasor, an action will, of course, lie to recover it back. Frequently, however, there will be no action at law which will be adapted to the circumstances of the case; and in all such cases it seems that equity ought to interfere by compelling a restoration to the person injured of any fruits of the tort which can be found in the possession of the representatives of the tort-feasor. This, however, is not entirely clear upon authority.<sup>1</sup>

It has been assumed hitherto that every tort consists in misfeasance. In fact, however, some torts consist in nonfeasance merely; for whenever the law imposes a duty upon a person, which does not amount technically to an obligation, any failure to perform that duty by which another person is injured (as it is not a breach of obligation) is a tort. It is generally true that a misfeasance is a tort, and a wrongful nonfeasance a breach of obligation; but the converse is also sometimes true; for, as a nonfeasance may be a tort, so a misfeasance may be a breach of obligation. There is, however, a broad distinction, in respect to equity jurisdiction, between misfeasance and nonfeasance; and this fact may suggest the propriety of dividing the jurisdiction over torts and contracts into cases of misfeasance and cases of nonfeasance. It certainly is not convenient to consider those torts which consist in nonfeasance, until those nonfeasances are considered which consist of breaches of contract; but neither is it convenient to consider those breaches of contract which consist in misfeasance until those breaches of contract which consist in nonfeasance are considered. Therefore, both classes of cases will be postponed until the jurisdiction over affirmative contracts is disposed of, *i. e.*, those contracts the breaches of which consist in nonfeasances.

*C. C. Langdell.*

[*To be continued.*]

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<sup>1</sup> See *Bishop of Winchester v. Knight*, 1 P. Wms. 406; *Thomas v. Oakley*, 18 Ves. 184, 186, *per* Lord Eldon; *Pulteney v. Warren*, 6 Ves. 72.

## “TRUSTS.”

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### I.

PRACTISING lawyers in so progressive a country as America are continually met with new devices, with new legal situations, with want of remedies, for which neither the text-books nor their legal education afford them precedent or direct advice; and their law schools, to which they would naturally look for relief, forgetting perhaps too easily that law—at least, American law—is a science that is always becoming, never being, overlook the present in their study of the past. Like an exuberant vine, first twining for support upon the rocks of practice and precedent, it then separates, overthrows, and, lastly, scatters them into new heaps whose equilibrium is more stably adjusted to the needs of a growing democracy. It seems that the pages of this REVIEW are a happy ground where those who are battling in fields of practice may meet others still clear-minded with the quiet wisdom of theory; nor should the law-student hear without interest those questions which newly vex the active bar, though it may be years ere they are cut short by statute, or come to authoritative decision, and thence broaden down to text-books, and become an orthodox part of the science of the law.

We have heard much of the dangers of corporations in late years; but, while our publicists had hardly whetted their swords to meet this question, we are confronted with a new monster a thousand times more terrible. Every student knows how corporations have grown from a monastic institution to the predominance they now occupy in the business world; but American ingenuity has invented a legal machine which may swallow a hundred corporations or a hundred thousand individuals; and then, with all the corporate irresponsibility, their united power be stored, like a dynamo, in portable compass, and wielded by one or two men. Not even amenable to the restraints of corporation law, these “trusts” may realize the Satanic ambition,—infinite and irresponsible power free of check or conscience. Corporations are bad enough; it is one of the defects of the historical growth of law that the conditions which attend the birth of a legal idea so infinitely differ from those that make possible its greatest

development ; but the trust is to the corporation what the mitrail-leuse is to a blunderbuss.

The "trust," as the word is here employed, meaning by it a combination of property, real or personal, with powers of management or absolute disposal, or of stock in corporations, in the hands of a few persons, is a perfectly new device in the law. There are as yet positively no reported cases in courts of last resort regulating or interpreting them ; nor have any statutes been enacted bearing upon the subject. The matter is therefore, an entirely open one, to be determined by lawyers on general principles of law, and by business men entering into such trusts upon ordinary principles of business sagacity. The objects of the "trust" may be broadly stated to be, either (1) monopoly, (2) concentration of power in few hands, (3) evasion of the laws regulating corporations,—any or all of them. Of course, under monopoly we include the pooling of prices and wages, the regulation of production, the extermination of competitors.

We must further distinguish two kinds of these trusts ; the first, or more simple kind, where tangible property, real or personal, or stock (meaning stock-in-trade or cattle), or manufacturing property or businesses are given directly to or placed in the hands of a few men for management, control, or disposal ; second, where the stock or franchises of corporations are placed in the hands of a few men or of a dominant corporation for the same purposes. The latter class, which is even more complex and of more questionable legality than the first, we shall for convenience term corporate trusts.

The origin of the word "trust" seems to have been the well-known Standard Oil Monopoly. The defenders of the trust point to this as a justification both of the need of the invention and its practical success. In the Standard Oil case there were a few men who had acquired controlling interest in a few (at first) manufacturing or mining properties, situated in different States. How could they manage them all ? Not personally, for they wished to avoid personal liability ; not through corporations, for, as their acquisitions increased, it was seen that the whole time of these two or three men would be taken up by going about to corporate meetings, publishing notices, placating stockholders, and complying with the (to them) vexatious restrictions concerning corporate management of the several States wherein their business lay.

Accordingly the famous Standard Oil Trust was drawn ; written, I believe, in ordinary handwriting, of which there is but one copy in existence, and that kept from the possession of the parties to the trust themselves. No other person has ever seen it, and all the public can know about it is to judge it by its fruits ; for since that trust was drawn, the Standard Oil has grown to be a more powerful — corporation, shall we call it ? or what ? for this is one of our questions — than any other below the national government itself.

We may take the Standard Oil as the type and consummation of the simple business trust. Ectypes are springing up in all directions with portentous rapidity. Philadelphia, in particular, is the home of trusts, for a Philadelphia lawyer is said to have invented them. Trusts for monopolizing the gas production of the country ; the water supply system ; the horse-railway system ; the cotton-seed oil business, of which more later ; the cattle trust ; the rubber trust ; the straw-board trust, — the list is endless. Now, these trusts have one legitimate advantage, the economy that arises from the united management of a large concern, owning the best inventions, buying its supplies in the lowest market, and employing the best advice and most skilled labor. Moreover, by this general system many offices and management charges in each local enterprise are dispensed with. But here, almost immediately, those advantages which may be called absolutely legitimate end ; it is questionable whether under older ideas even the “ regulation ” — *i.e.*, repression — of production is so. One of the great advantages of some trusts is the power they possess of *destroying* private enterprise. Take the Philadelphia gas, for instance (and the name is purposely misquoted), a company which owns gas-works in a hundred cities. Say that in two of these are competing works, and that the gas costs the company sixty cents a thousand ; a price at which the competing company can also live. The Philadelphia company puts its price in those two cities down to ten cents a thousand, and charges its patrons sixty-one cents in the other ninety-eight cities. The profits of the Philadelphia company remain the same, but its only two remaining rivals are ruined.

Now, before turning to the law, let us take an example of the other and even more dangerous trusts, — corporate trusts. They are usually created for controlling the stock or management of the corporation in whose shares they consist ; thus creating a sort of a

machine upon a machine, one fictitious person within another. And the process may even be repeated indefinitely, one-half the trusted stock being sold, *i.e.*, the certificates for it, and a new trust created of the other half, plus one share to ensure a majority ; so that, as long as the public continue to accept these trust certificates for stock, we may, by a sort of system of Chinese boxes, one within the other, see finally the absolute control of a corporation vested in a sixteenth or a thirty-second interest in its actual capital. And the peculiar profit to the insiders in these is, that they require little expenditure of money to give enormous power. For the so-called trust-certificates, which carry no voting power, may be sold in the exchanges as readily as the stock they represent ; and the trustees having sold half the company's actual stock, and trust-certificates representing the other half, have got back all their money, and are left with half the stock of the original corporation to ensure their own control, besides being parties-trustees to an irrevocable trust-deed.

## II.

The consideration of this subject falls naturally into two branches : first, the relation of such trusts to public policy, and herewith of their legality and probable future treatment by courts and legislatures ; second, the effect of them upon persons or parties entering into them, and herewith of their general advisability and safety to the persons concerned.

The objection that such trusts tend to create a monopoly applies equally to both classes, — the simple and the corporate trust. But this, until the legislatures have made enactments to that effect, and except, perhaps, in those States which have constitutional provisions forbidding monopolies, must be deemed a merely sentimental objection. The following States and one territory, as I have noted in my book on American Statute Law, section 404, have such a constitutional provision : Maryland, North Carolina, Tennessee, Arkansas, Texas, New Mexico. It might also be urged against both classes of trusts that they may be void as creating a perpetuity. On careful consideration, however, it does not appear that this is the case. For, in the first place, no such perpetuity could be created where, as is usually the case, the trustees or managers of the trust have full power to convey all or any part of the property put in the trust ; and, in the second place, the better

opinion is that no perpetuity is created except as to a future limitation. The mere tying up of property, for however long or indefinite a period, is no perpetuity in itself, whatever may be the result as to subsequent limitations. (See Gray on Perpetuities.) It is, however, to be carefully considered, that a deed of property to certain persons in trust for a period beyond twenty-one years, or for an indefinite period, with limitation thereafter to the original owners, may possibly be attended with the danger of putting the absolute property in these managers, so that the subsequent limitation would be void, and the original owners or other persons could never recover it back.

There is a third general objection, applying to both classes of these trusts, and one which must be considered fatal in those States where it applies. This is, that the laws of several States specify expressly all objects for which legal trusts may be created, and forbid, expressly or by implication, all others. These States are New York, Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky, and Vermont. (American Statute Law, sect. 1703.) These allowable objects of trusts may be roughly stated to be for the selling of lands; for the receiving of the rents and profits of lands, and applying them to the use of any person for his life or any shorter time; for the accumulation of rents and profits for the time by law allowed; for the benefit of any person where the trust is fully expressed and clearly defined, *subject to the limitation of the law against perpetuities* (in Michigan and Wisconsin), and for public or charitable purposes. As none of the objects of the trusts treated of in this article would fall under these exceptions, any trust which carries property in any of these States would seem to be in that State void. But I have met lawyers who held a contrary opinion.

There is a fourth legal objection, which applies to the second variety only, which we have termed corporate trusts. This is, that they practically do away with the whole law regulating corporations, with all the safeguards regulating their corporate management, the control of their stock, and the exercise of their franchises, besides evading all the laws regulating their capitalization and consolidations.

It may seriously be questioned whether a *quo warranto* will not lie on relation to the attorney-general of the State to test by what



right the managers of such trusts exercise corporate franchises (see the Cotton-seed Oil case below), and it may also be questioned whether the courts will not set aside all such trusts as contrary to public policy.

But, notwithstanding all this, it may be reasonably urged that, until the courts have set aside such trusts or any one of them, and until the legislatures have forbidden or regulated them by statute, there is no objection to entering into them, provided their nature and terms are such as to make it profitable to enter into them, and reasonably safe according to ordinary law and business principles. And this brings us to the second branch of the subject, namely, their effect upon the interests of the individuals composing them, and their legal rights, as against the trustees or managers, and in the common property so entrusted.

First, as to simple trusts. Of such nature are the business and manufacturing trusts, like the Straw-board Trust and the Cotton-seed Oil Trust, and the Cattle Trust, *when no corporations are constituent members of the trust*; if corporations are involved, the only difference is that the effects and criticism applying to the second class, as mentioned below, are superadded.

One fundamental objection to all such trusts is their secrecy. It is very common for such trusts to be created without allowing the individuals who entrust their property or its management even to see the deed or declaration which sets forth the duties and liabilities of the managers and the rights and liabilities of the persons composing it. Sometimes, perhaps, even no such declaration is drawn up and signed.

In considering what such a deed should contain we must again make a distinction between two possible kinds of trust,—the trust of management or control merely, and that of property and management. In the first kind the individual member parts with the management or control of his property, wholly or partially, while retaining the property title to his individual possessions; in the second, he parts with his title also, and gets in return a mere certificate of his proportionate or appraised interest in the general trust.

The first kind is comparatively free from danger. If the individual is satisfied with the trustees, and sees nothing to object to in the proposed system of management, and if the prospect of increased profits is sufficiently great to make him willing to part

with his inalienable right of doing what he will with his own, such a trust may justify itself to his judgment. It may probably be said that such a trust is generally most beneficial to those who have made a failure in their individual business; and, therefore, those who have a concern already profitable should scrutinize it with great care. And in connection with this point there should certainly be, in all these trusts, a provision to enable the individual to withdraw his property from the trust upon giving reasonable notice, if he does not like the way things are going; nor should any such trust be created, save for a definite term of years,—ten years at the most. No argument, however specious, should lead the individual to dispense with this provision in the deed of trust, in the first kind, or management trust, at least; for, if at the end of the term of years the trust has proved a success, a majority can be relied on to continue it; if not, it is best for all but the weakest that it should be dissolved. In the property trust, however, it is more difficult to make this provision; for in this case the individuals have finally parted with their individual property; in many trusts, particularly those of stock-in-trade, or other personal property, their individual shares cannot be traced, or, if traced, they have been modified, increased, improved, or altered; the individual has only a certificate entitling him to a certain aliquot part of the general trust property.

Next, let us consider the legal effect of the trust as among the members, and between the members and the trustees. Will the courts rule that such trusts create a partnership, as between the individual members and the trustees, or even as between the members and each other who are not trustees? The trustees, in effect, enter into the liabilities of partners as among themselves. Particularly would this be the case when the trust-deed is not duly recorded; and it is to be remembered that the individual members have formally appointed the trustees their agents; they have put their property and business into a common pool, made it liable for each other's debts, in the general business,—a business which, moreover, they are probably still superintending, at least in detail, themselves; and, moreover, the managers, or so-called trustees, have probably put similar property and businesses of their own in, and are acting thus in the double capacity of member and manager. If not partners, what are they? They have put capital into a business which is certainly not a corporation, nor yet a joint-

stock association, however closely the "trust-certificates" may resemble, in appearance, certificates of stock; and they have filed no declaration of limited partnership under the statute, and, moreover, they are "transacting business for the concern, or acting as agent therefor."

But it will be replied, they are not partners, but *cestuis que trustent*. Assuming, therefore, that the courts will so hold, let us consider the transaction from this point of view. The stockholders have parted with their property, and have nothing to show for it but the trust-certificate—a mere receipt, but upon which, if sealed or expressed to be for valuable consideration, it is doubtful if the law will imply any trust at all. The trust must, therefore, be declared by the trust-deed, assented to by the trustees or managers.

Now, generally, it will be impossible to define, with any degree of accuracy, what the objects of the trust are to be; and it is always impossible to define the duties of the trustees and the methods to be employed by them in managing their business. Practically, unless the trust contemplates a definite sale of all the property at a limited price, the words of the trust-deed, however elaborate, will amount to this: To manage the aggregate property for the equal good of all concerned. It will be possible, perhaps, to provide that the profits, if any, are to be divided among the certificate-holders when made; but who is to determine when they are made, or what are the profits?

Now, what are the rights of the certificate-holders? Holders of corporate stock have the following principal rights and privileges: they may sell their stock; they may govern the management of property by frequent elections; the property cannot be sold, mortgaged, leased, or consolidated, or its business changed, without their express consent; breaches of duty by the officers may be easily enjoined by any stockholder; and they are not individually liable for the debts of the corporation or its officers.

How many of these ordinary rights of corporate management do the certificate-holders retain? Of their possible liability for the debts of the trusts and its managers I have already spoken. They can only sell or assign their certificates in States which have a special statute authorizing assignment of choses in action; in other States the buyer will perhaps have to file a bill of equity to get complete title. They have no power to remove trustees who prove

dishonest or dangerous, nor to replace them by good ones. The managers may sell, incumber, add worthless properties, consolidate with others, lease, leave idle, or apply the lands to the growing of cucumbers, the machinery to the extraction of sunshine from them, and the live-stock to the menagerie trade, if they so choose ; unless, of course, the trust-deed restricts them, which is not usually the case ; and if they cannot sell and convey under the trust, then neither can the stockholders, and, as there is no provision for deeding back, the property is tied up indefinitely. Finally, if the members think the managers are acting unskilfully they have no remedy whatever ; and even if the trustees act wrongfully, they have only a long and uncertain bill in equity to ascertain the objects of the trust, and remove the trustees if it can be proved that they have acted fraudulently ; and I am inclined to think this bill would have to be unanimous to be successful, at least unanimous so far as the certificate-holders who were not trustees were concerned.

As to the other class of trusts, which we have termed corporate, the objections are more numerous and serious. If the trust sought to merge the corporations themselves, or their franchises, it would be illegal beyond all question. If the trust provides for the assignment of all the corporate assets only, it is undoubtedly illegal, as *ultra vires*. And, even if the corporation merely relinquishes its power of management through and by its own stockholders, it is possibly *ultra vires* still.

But the usual way in which the corporate trust is affected is by assignment of stock, by all or a majority of the stockholders, to the managers of the trust. As all the forms of law could be complied with, and the trust managers continue to vote themselves in as directors and keep up the corporate management, it is probable that there is no legal obstacle to this ; though it is possible that a bill would lie, even by a single dissenting stockholder, to enjoin such managers from merging the corporation business in any such trust combination.

Until new legislation, therefore, such trusts may be considered legal, though they practically do away with all the law of corporations.

The minority stockholders are usually driven into such a combination by threats that "outside" or un-trusted stock will not share in the benefits anticipated. So far as the earnings or proceeds of

the assets of the company are concerned this is an idle threat. The majority of stockholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share. (*Menier v. Hooper's T. W.*, 9 L. J. Ch. App. Ca. 350, 354.) And the language of Judge Wallace is noteworthy in *Ervin v. O. R. & N. Co.*, 27 Fed. Rep. 630: "It cannot be denied that minority shareholders are bound hand and foot to the majority in all matters of legitimate business . . . but the corporate powers can only be exercised to accomplish the objects for which they were called into existence, and the majority cannot control these powers to pervert or destroy the original purpose of the corporations. When a number of shareholders combine to constitute themselves a majority, in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation toward its shareholders." And it has lately been held by Judge Wheeler, in *Woodruff v. The D. & S. C. R.R. Co.*, that where stock is deposited in such a trust with power to vote and sell, but the stock certificates, though deposited, are not actually assigned to the trustees, that such a deposit, with the attendant power to vote, is revocable by a single stockholder at any time.

### III.

But the only case in which the general status of these trusts has yet approached discussion is that of the State of Louisiana against the Cotton-oil Trust, now still pending. The bill charges that this organization, although a foreign association carrying on business in Louisiana, has no domicile or place of business in that State, or known agent upon whom process can be served, as the Constitution of the State requires; and, further, has no license or permit to carry on business, and pays no taxes to the State of Louisiana or the city of New Orleans. The bill reviews the history of the association from its beginning, alleging, *inter alia*, that it was never properly incorporated, like other incorporations, but sprang into life as an association under an agreement and by-laws which it has kept to this day a profound secret; that it was established for the purpose of controlling and monopolizing the cotton-seed market; and that, having secured possession of the leading mills in the State, it has proceeded to depreciate the value

of cotton-seed,—a valuable commercial product,—which it has forced down in price from \$14.00 to \$6.00 per ton, to the injury of the planters engaged in raising the seed.

It is further charged, that all the lines of transportation in the State of Louisiana, both by land and water, are, through the machinations of this powerful monopoly, discriminating in favor of shipments of cotton-seed consigned to manufacturers controlled by the trust, to the injury of the business of all manufacturers who are not in the ring. That “the said illegal association has within the last year acquired a majority of the stock in the several corporations organized and operating in this State, under the laws thereof, for the purpose of purchasing cotton-seed oil, soap, oil-cake, and other articles of commerce. That the American Cotton-oil Trust acquired the majority of stock in said corporations, organized under the laws of this State, by exchanging certificates of its stock for certificates of stock in said corporations at a premium and advance thereon, and have elected directors and are controlling and operating said cotton-mills, the property of said corporations, solely for the interest and benefit of said illegal association. In making said exchanges the Trust illegally fabricated, manufactured, and issued certificates purporting to represent shares in the equity to the property held by the trustees of the American Cotton-oil Trust. No such estate or trust-title is valid under the laws and jurisprudence of Louisiana.

“Petitioner avers that the trust is an illegal, invalid, and corrupt association; the object and aims thereof are in contravention of the constitution and laws of this State, and its existence should be suppressed and destroyed.”

The prayer of the bill is for a permanent injunction against the association from doing business in the State, and that the American Cotton-oil Trust be adjudged guilty of usurpation, intruding into and unlawfully holding and exercising the privileges of a corporation without being duly incorporated, and be forever excluded and debarred from the franchises and privileges within this State, and declared to be an illegal, invalid, and fraudulent association.

It will be seen that this case is in effect an information, in the nature of *quo warranto*, brought by the attorney-general. A demurrer was filed to the bill in due course, and this demurrer has been overruled.

This case raises the radical question, that is, of the very legal existence of the "trust" itself. For this reason its future progress should be watched with the greatest interest.

It has been sought in this article merely to raise questions, — legal doubts, — which the author certainly is incompetent to solve. Space forbids more than the merest mention of them. It is probable that many conflicting decisions in the courts, and many years' time will come, before this new question becomes settled, even in its general lines; and it is possible, perhaps desirable, that the knot be cut by stringent legislation. In the present opinion of the author such would be the best way out of the difficulty; for of the ultimate injury to be caused by such huge, irresponsible, indeterminate concerns there can be little difference of opinion. He would, therefore, close with the suggestion of three statutes, whose rigid enforcement might, with due adjustment to meet evasions, be expected to meet the case.

I. Every organization, association, combination, or trust of persons or corporations, which seeks to control, combine, pool, or consolidate the business or property of any persons or corporations engaged in any trade, business, or manufacture, or which seeks to consolidate several such properties, or unite several businesses, or place the property of individuals or corporations, or the capital stock thereof, in the hands of individuals for control or management, shall be deemed a corporation, and subject to all the regulations of the laws as such.

II. No proxy, or power of attorney given to vote or assign corporate stock, shall be valid for a longer period than ninety days; and every certificate issued, purporting to represent corporate stock, or an equitable interest in a portion of such stock, shall carry with it the power to vote on said stock; and all other such certificates shall be void.

III. No corporation shall hold, or control, directly or indirectly, or through any trustees or agents, the stock of another corporation.

The last provision may, to our present lax ideas upon the subject, seem stringent and unpractical; but it seems to me the strict remedy must now be applied, if we would escape greater evils.

*F. J. Stimson.*

# HARVARD LAW REVIEW

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AT the opening of a new academic year it will not be out of place to call attention to the large number of students in the School, and to the reasons which have led to the increase. The total number is now, for the first time, over two hundred, and of these some thirty have returned for the third-year course. This increase is due, in the first place, to what we must believe is a growing interest in the School and in its methods. We propose in the next number to publish a tabulated statement, which will give in detail the number of students during the past few years, and will show the proportion of those who come hither from other colleges. For the present it is enough to cite the number of third-year men as a proof of the appreciation with which the School is regarded by those who have already had some opportunity to test its methods.

Another reason, however, exists in this particular year for the increase in the number of new students. The Harvard Law School Association, which was started last November, at the time of the anniversary celebration, has had not only the effect of uniting the alumni, but has been the means of drawing the attention of the profession at large, particularly of students, to the Harvard Law School, and it is, perhaps, not too much to say, that the numbers of students can be traced, more or less directly, to the influence of the Association. We are glad to announce that through the kindness of the officers of the Association we shall be able to give information about the meetings, together with such official reports and announcements as may be of interest to the readers of the *Review*.

THE form of Mr. Justice Kay's order in *McManus v. Cooke*, 35 Ch. D. 681, furnishes an almost humorous illustration of the reluctance with which a mandatory injunction is granted. He allows a "perpetual injunction to restrain the defendant from permitting his present sky-light to remain."



THE course in the history of the early English common law, known as "Points in Legal History," which was given by Prof. Ames for the first time last year, will hereafter be given only in alternate years. This course is, perhaps, as well adapted to the alternate system as any course in the school, as it can be taken with advantage by either second or third year students. It is probable that in a few years a corresponding course will be given by Prof. Ames on the classification of the law.

THE catalogue of the School, which is being prepared by Mr. Arnold, the librarian, is to contain the names of all persons connected with the School from 1817 to 1886, inclusive, a number considerably over five thousand. It will give the full name, the date of entering, the year of leaving, the degrees, if any, conferred by the School, and other interesting particulars. Good progress has been made on the work during the summer, though, on account of the unsatisfactory state of the early records, the work has been necessarily slow and laborious. A special effort will be made to obtain the present addresses of the members, a difficult undertaking, as the School has never had any class organization, and no attempt has ever been made to keep the addresses up to date.

THE last number of the "Law Quarterly" contains a discussion of the validity of determinable fees by Mr. H. W. Challis and Prof. Gray. The latter sums up his position as follows: "In conclusion, let me put a practical question. Suppose that a building had been conveyed by A to B, to hold to him and his heirs so long as it was used as a dwelling-house; and that, all the houses in the neighborhood having been turned into shops, B turned his building into a shop also,—does any one believe that a suit by the Crown to get possession of the land would, as a matter of real life, be successful in the courts of to-day? I should say it could not, because (1) since the statute *Quia Emptores* there can be no possibility of reverter; (2) if there could be, the one which it is here attempted to create is too remote. But what would be the answer of those who deny these propositions?"

THE Law School opens this year with 204 students, classified as follows: Graduates, 2; third-year, 31; second-year, 52; first-year, 80; special, 39. Those entering the School are 113 in number. These newcomers are drawn from different States and countries, as is shown below: Massachusetts, 50; New York, 10; Ohio, 7; New Hampshire, 6; Illinois, 5; California, 4; Maine, 3; Kentucky, 3; Wisconsin, 3; Pennsylvania, 3; Rhode Island, 2; Tennessee, 2; Missouri, 2; New Brunswick, 2; and 1 each from Iowa, Minnesota, Florida, Kansas, Louisiana, Connecticut, Nebraska, West Virginia, Maryland, New Jersey, and London, Eng. Seventy-three have received college degrees, distributed as follows: Harvard, 43; Amherst, 5; Brown, 5; Yale, 4; Oberlin, 2; and Wesleyan, Bowdoin, Tufts, University of California, Kansas Normal, Massachusetts Agricultural, Eureka, Fisk, University of New Brunswick, Beloit, Kentucky University, Baden Gymnasium, Allegheny, and Trinity, 1 each.

A DECISION of special interest to professors and students has recently been given by the House of Lords, in the case of *Caird v. Sime*, 12

Ap. Cas. 326, to the effect that the oral delivery of class-room lectures is not such a publication as to entitle any one to print them without permission of the author. The plaintiff in the case was Professor Caird, of the University of Glasgow, and the defendant a bookseller of that city, who had published certain lectures on moral philosophy, from notes taken by a student in the class-room. There was much difference of opinion on the point. The court of last resort in Scotland, thirteen judges sitting, was almost equally divided, and a vigorous dissenting opinion was delivered in the House of Lords. The action was resisted on the ground that a class of students in a university open to all is a "public audience," and that delivery to them is a dedication to the public or an abandonment of the property which a lecturer has in his unpublished work. The Court denied both propositions, and held that lecturing to students is publication only for the purpose of instruction, and that hearers are admitted under an implied contract or condition not to publish what they hear.

WE have received from Prof. Frederick Pollock, of London, a Moot Court decision involving the question whether a contract is complete on the mailing or on the receipt of the offeree's acceptance of the offerer's proposal. This point is one of great interest to students of the Harvard Law School on account of the forcible manner in which Prof. Langdell sustains, on the theory of offer and counter-offer, the result reached by the Massachusetts courts, that the letter must have been received by the offerer in order to make the promise binding. Prof. Pollock upholds the other view, regarding himself bound by the English law on this point. We quote the following:—

"According to the decision of the majority of the Court of Appeal in *Household Ins. Co. v. Grant*,<sup>1</sup> the posting of the defendant's letter was enough as against the plaintiff to convert the plaintiff's offer into a binding promise, although, by an accident beyond the control of either party, the letter failed to reach the plaintiff. This is because the party who makes the offer of a contract by means of the public post to a person at such a distance that the post is the most obvious means of communication, is *prima facie* deemed to desire, or at any rate, authorize the offeree to send an answer by the like means, and, as an incident thereto, is deemed to take upon himself the risks of the mode of communication which he has authorized. . . . It has been suggested, again, that a difference is to be made between an offer which contemplates an act to be done by the other party, and an offer which contemplates a reciprocal promise; that acceptance must be communicated if it consists of a promise, but that where it consists in performing, the consideration for which a promise is offered by the proposer, communication is on general principles unnecessary; and that the true ground of the authorities is to be sought in this distinction.<sup>2</sup> If this test were the correct one, the decisions on contracts to take shares, and therefore *Household Fire Ins. Co. v. Grant*, would not apply to a case like the present, in which the contract consists wholly in mutual promises. But we are bound not merely by the letter of adjudged cases, but by their declared and apparent reasons; and the suggestions

<sup>1</sup> 4 Ex. D. 216.

<sup>2</sup> Langdell, Sum. of the Law of Contracts, §§ 6, 14-16.

now mentioned seem to me not only to lack any warrant of authority, but to be inconsistent with the express *ratio decidendi* of the authorities, which, here at any rate, must be received as decisive."

THE Harvard Law School has been peculiarly favored in the men who, from its earliest days to the present time, have filled the positions of professors and lecturers. The oldest professorship is the Royall professorship, which was endowed by Hon. Isaac Royall in 1779. The first incumbent was Hon. Isaac Parker, Chief Justice of Massachusetts, who held the position from 1816 to 1827. His successors have been: John H. Ashmun, 1829-1833; Simon Greenleaf, 1833-1846; Hon. William Kent, son of Chancellor Kent, 1846-1847; Hon. Joel Parker, Chief Justice of New Hampshire, 1847-1867; Hon. Nathaniel Holmes, Associate Justice of Missouri, 1868-1872; James B. Thayer, 1874-1883; John C. Gray, 1883- —.

When Chief Justice Parker was appointed to the Royall professorship, Hon. Asahel Stearns was selected as a colleague, and was assigned to the University professorship, a position which he held from 1817 to 1829. Subsequent holders of this professorship are Hon. F. H. Allen, 1849-1850; Hon. Emory Washburn, 1855-1862.

In 1829, a date of reorganization in the history of the School, Hon. Nathan Dane gave funds for Dane Hall, and to endow a professorship, to which Hon. Joseph Story was to be appointed. Judge Story was the Dane professor from this date till his death, in 1845. Certain precedence was attached to this professorship, and therefore on Professor Story's death, Professor Greenleaf was advanced to the vacant place. Theophilus Parsons was his successor in 1848. When this professorship again became vacant, in 1870, C. C. Langdell was selected, and later, by the choice of the Faculty, became the Dean, or executive head of the School.

In 1862, funds left by Benj. Bussey became available. The endowment of the University professorship was increased, and it was then called the Bussey professorship. Emory Washburn was the professor till 1876, and on his death, Hon. Chas. S. Bradley, Chief Justice of Rhode Island, was appointed. In 1879 James Barr Ames became the Bussey professor. In 1881 an anonymous gift was made to the School, by means of which a new professorship was endowed. Hon. Oliver Wendell Holmes, Jr., held it until his appointment to the supreme bench of Massachusetts, whereupon James B. Thayer was transferred from the Royall professorship.

In 1883 an assistant professorship was established, and Wm. A. Keener selected to fill it.

Besides these many noted writers and teachers who have been professors, the following have been lecturers or instructors in the School:—

Charles Sumner, J. C. Alvord, Henry Wheaton, Luther S. Cushing, Franklin Dexter, Edward G. Loring, Edward Everett, Richard H. Dana, Jr., Benj. R. Curtis, Benj. F. Thomas, Nicholas St. John Green, John Lathrop, Edmund H. Bennett, Henry Howland, Brooks Adams, G. F. Bigelow, Louis D. Brandeis, Charles M. Barnes, Henry W. Torrey, Jos. B. Warner, William Schofield.

WE have received from Mr. P. Edward Dove of London, the Hon. Secretary of the Selden Society, a learned opinion given by him on a

case submitted on behalf of the Corporation of Nottingham as to "Public Rights in Navigable Rivers":—

"It has been said," says Mr. Dove, "in several recent cases (*Murphy v. Ryan*, 2 Ir. R., C. L. 143; *Pearce v. Scotcher*, 9 Q. B. D. 162) that there can be no public right of fishing in non-tidal waters. The point has not yet come before any English Court of Appeal; and I have no hesitation in saying that it is not consistent with our earlier law."

To support this view Mr. Dove has made a careful and exhaustive study of the Hundred Rolles and other ancient sources, from which he reaches the following conclusions as to the present state of the law:—

"The right to fish in navigable rivers was originally a royal franchise, and, excepting where granted by the Crown to a private person, was exercisable by the public in virtue of its belonging to the Crown.

"In and prior to the date of Magna Charta, the Crown granted this franchise to private persons in respect of portions of the navigable rivers in England.

"To remedy what was considered to be a great injury to the public, one of the stipulations of Magna Charta was that no further grants of the kind should be made, and that all those granted since Henry the Second should be void.

"This law has never been changed.

"There have, however, been decisions in the Law Courts treating the right to fish in navigable rivers as though it was especially a right of a private nature, and belonged to the riparian owners. These decisions have been taken to be binding by reason of their being decisions of the Courts."

Accordingly he has drawn up a bill, declaratory of the law, in which he has embodied the result of his researches. This bill he hopes to have passed as "The Fishing in English Rivers Act, 1887." A correspondent of the "Law Quarterly," though in favor of the cause which Mr. Dove advocates, criticised several of his propositions as follows:—

"His first proposition is that every river that is in fact navigable for ships or boats is a 'public river' and a highway. This we imagine may be conceded by his adversaries, provided that the term 'public river' be not so used as to beg any question about the right to fish therein. But to show that a public river is a highway is little. A member of the public has a right to walk along the king's highway; he has no right to pluck the grass or pocket the stones. Mr. Dove's next proposition is that 'an exclusive right of fishery is a royal franchise.' But this proposition is too wide, for it would not be contended by any that in England the owner of both banks of a non-navigable river has not an exclusive right of fishing in it, and this without any grant from the Crown. The question then arises whether the line is to be drawn at the point where the modern authorities draw it, namely, where the river ceases to be tidal, or where Mr. Dove wants to draw it, namely, where the river ceases to be navigable."

## THE LAW SCHOOL.

## IN THE MOOT COURT.

*Coram* THAYER, J.*Catseye v. The Town of Camden.*

Tribal Indians, while off their reservation and within a State, are protected by the fourteenth amendment of the Constitution of the United States, as being persons entitled to the equal protection of the laws.

Where a statute giving an action against towns for injuries suffered by reason of a defect in the highway excepts such Indians from the benefits of it, the excepting clause is unconstitutional and void.

The plaintiff, an Indian belonging to the Sioux tribe and living on a Government reservation, having visited the defendant town, was injured by reason of a defect in a highway and brought an action of tort against the town for damages. The Statute of the State gave to all persons who might suffer an injury under such circumstances an action against the town; but it expressly excepted "all citizens or inhabitants of other States or countries not giving, under the same circumstances, a like right of action against the municipalities of such States or countries to citizens of this State; and also, all Indians in the United States, members of a tribe and living or belonging on a Government reservation." At the trial the defendant asked the judge to rule that the plaintiff could not maintain his action, but the judge refused so to rule and held that the excepting clause was void, as being contrary to the Constitution of the United States in denying to the plaintiff the equal protection of the laws. To this ruling the defendant alleges exceptions.

*W. B. Brice* and *R. S. Gorham* for Plaintiff.

*W. H. Cowles* and *F. Ladd* for Defendant.

This case, which was very well argued, raises the question whether a tribal Indian, residing on a Government reservation, is protected, while outside the reservation and within a State, by that clause of the fourteenth amendment to the United States Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws."

This language is very broad. The fourteenth amendment conferred or recognized citizenship in the case of "all persons born or naturalized in the United States, and subject to the jurisdiction thereof,"—a description which does not cover tribal Indians, *Elk v. Wilkins*, 112 U. S. 94, 102; and it also forbade a State to abridge the privileges of citizens of the United States. It then took a wider range, and protected not merely citizens, but all persons,— "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Unnaturalized foreigners are protected by these last clauses, including foreigners whom our laws do not at present permit to be naturalized, like the Chinese. *Yick Wo v. Hopkins*, 118 U. S. 356. No human being, however degraded, belonging in any obscure corner of Asia, Africa, or Europe, would be outside these provisions of our Constitution if he should come to any of our States. The "Hottentot Venus" (13 East, 195), if she were now living and

were brought here for exhibition, would be protected by them. If our native Indian tribes are not covered by them, they are the only human beings of whom that is true.

It must be carefully observed that the question relates to an Indian while within a State and off his reservation; it has nothing to do with the case of an Indian on his reservation.

What, then, is there in the character of a tribal Indian to take him out from these clauses of the Constitution? He is a "person," in the sense of being a human being; and why are we to give to the term in this part of the Constitution any narrower meaning than that which includes all human beings? It is said that a tribal Indian living on a reservation is neither a citizen of this country, nor a member of any foreign State. That is true. Indian tribes are not foreign States, *The Cherokee Nation v. Georgia*, 5 Pet. 1; and the members of them are not citizens or subjects of a foreign State, *Karrahoov v. Adams*, 1 Dillon, 344; and if it were true that all persons must be either citizens here, or citizens or subjects of a foreign country, then, indeed, tribal Indians would not be "persons." But it would be a begging of the question to say that. We have, in these tribal Indians, a class of human beings who are neither one nor the other. No doubt their position is very peculiar, and various phrases have been invented to describe it, such as, "domestic dependent nations," 5 Pet. 17; and "wards of the nation," 118 U. S. 383. But both in the Constitution and Statutes of the United States they are referred to as persons. Const. U. S., Art. 1, s. 2; 112 U. S. 112. In large numbers they have been made citizens of the United States. 19 Howard, 587; 112 U. S. 112. They may, when off their reservations, sue in the courts, and are fully recognized as having legal rights and duties. This last statement is sometimes denied; but the denial is ill-considered, and proceeds upon a misunderstanding of a certain peculiar class of cases, such as that of *The Cherokee Nation v. Georgia*, 5 Pet. 1, and *Karrahoov v. Adams*, 1 Dillon, 344, turning wholly upon the limitations of the jurisdiction of the courts of the United States. In the last case, for instance, it was admitted that the court had no jurisdiction of the case, if the plaintiff, a tribal Indian woman, were not a foreigner; and it was held that she was not. And so, in any like case in the United States courts, wherever jurisdiction depends wholly on the fact that a party has the status either of a citizen of the United States or of a foreign State, — it is true that an Indian cannot sue.

But there are many cases in which jurisdiction does not depend upon the party having such a status, and in all such cases an Indian off his reservation can sue in the United States court as well as in the courts of the States. *Fellows v. Blacksmith*, 19 How. 366; *Elk v. Wilkins*, 112 U. S. 94; *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. Rep. 740; *Wau-pe-mau-quav v. Aldrich*, 28 *ib.* 489; *Swartzel v. Rogers*, 3 Kansas, 374; *Willey v. Keokuk*, 6 *ib.* 94. It appears, then, to be true that the clauses of the fourteenth amendment, now under consideration, are, in the language of the Supreme Court of the United States (Matthews J.), "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." *Yick Wo v. Hopkins*, 118 U. S., at p. 369. And the remark of Taney, C. J., in *Scott v. Sandford*, 19 How., at p. 403, appears to be substantially accurate when he says that if an

Indian "should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which belong to an emigrant from any other foreign people." If this was true in 1856, it is no less true since the fourteenth amendment; and it is as true of any Indian who is a transient visitor among the whites as it is of a permanent resident.

But it is said that the statute which gives an action in this case is simply a punitive measure against the town, and that the excepted persons are not thereby deprived of the equal protection of the law. If this were a true description of the character and purpose of the statute, it is by no means certain that it would support the defendant's conclusion. But it seems not to be the just view of the statute. There was no private action at common law in such cases, because the town was considered to be acting as an agency of the public, and its duty was considered to be owing to the public, and not to any individual; and the remedy was in the name of the public by indictment, a proceeding in this sort of case which was criminal only in form. *Mower v. Leicester*, 9 Mass. 247; *Hill v. Boston*, 122 Mass. 344; *Gibson v. Preston*, L. R. 5 Q. B., at p. 222; *Queen v. Stephens*, L. R. 1 Q. B. 702. When a private action of tort is given against the town, it is given for the benefit of the injured person, that he may recover compensation for his injury. And if this benefit is conferred upon one class of persons and denied to another class, the law establishes inequality of benefit or privilege. If in giving a new action, such a discrimination may be made, it would seem, on the same principle, that an existing right might be taken away from some and not from others. And if one action or remedy may be taken away from a given class of persons, five or ten actions, or all of them, may be taken away. But, as it has been said by the Supreme Court of the United States, the granting of "the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S., at p. 369. Accordingly, in *Pearson v. Portland*, 69 Maine, 278, it was held that a statute similar to the one now in question which took away the action from citizens of other States or countries that did not give a like remedy in like cases to citizens of Maine was unconstitutional, as denying to such foreigners the equal protection of the laws.

It is urged that this legislation is a legitimate exercise of the police power; but by whatever name it be called, it seems to be, in truth, an attempt by one State to secure a certain benefit for its citizens which is now denied to them in other States and countries, by means of a denial to the citizens of these other States or countries of the equal benefit and protection of the laws within its own borders. This particular mode of accomplishing the object, whether it be called an exercise of the police power or anything else, is in terms forbidden by the Constitution. And it may be added that, as regards Indians in the cause at bar, it is a total and absolute denial of the benefit of this action against the towns without any qualification whatever,—a denial to all of them, as a class, of a privilege which is totally and absolutely denied to no one else. But the fourteenth amendment secures full equality of protection to all persons. In commenting on the two clauses of the fourteenth amendment relating to "persons," it was said by the Supreme Court (Strong, J.), in *Strauder v. West Virginia*, 100 U. S. 303, 307, in language as applicable to all other

persons as to the negroes: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations implying inferiority in civil society; lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It is possible that some qualifications are necessary to this statement (*People v. Gallagher*, 93 N. Y. 438); but, taking it as substantially true, I am not aware of any reason why that which is here said of the scope of the protection and immunity afforded by these clauses to the blacks is not also true as regards any other "person." That part, therefore, of the excepting clause of the statute now in question, which purports to exclude tribal Indians from the benefit of it, appears to be contrary to the Constitution of the United States.

It is urged that, if this be so, the court must hold the whole statute unconstitutional, because, otherwise, a judicial tribunal would, in effect, be legislating Indians into the privileges of the statute, and giving them a benefit which the Legislature never intended that they should have. But I think this argument rather plausible than sound. It is well settled that a part only of a statute may be held to be void and the rest remain in force. "When part of a statute is unconstitutional, that will not authorize the Court to declare the remainder of the statute void unless all the provisions are . . . so connected in meaning that it cannot be presumed that the Legislature would have passed one without the other." *Com. v. Hitchings*, 5 Gray, at p. 485; Sedgwick on Construction of Stat. and Const. Law, 2d ed., 43, note (a). In this case the Legislature gave a general right, and excluded from it what may fairly be supposed to be a small class of persons. This exclusion is unconstitutional; but there is nothing to indicate that the Legislature regarded the exclusion as an essential part, or in any other light than as a quite subordinate part of their general purpose.

*Exceptions overruled.*

#### CLUB COURTS.

##### SUPREME COURT OF THE POW-WOW.

*Fire Insurance. Loss occasioned by the felonious Act of the Wife of the Assured. Rights of the Insurer.*

The facts were these: A insured B's house. B's wife, C, without the connivance of B, maliciously burned the house with the intention of enabling B to get the insurance money. A, having paid the policy to B, sues C. The argument against recovery is that A's only remedy is to be subrogated to the rights of B against C; but as a husband cannot sue his wife, A has no remedy whatever against C. This reasoning would undoubtedly prevail in England today. [Cf. *Midland Ins. Co. v. Smith*, 6 Q. B. D. 561.]



Admitting, however, that there is no room in this case for a remedy in equity by way of subrogation, is not this a case which is covered by the common-law action on the case? The action on the case is extremely elastic. It is said in Com. Dig., Act. on Case A, — "In all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages."

A principle as broad as this is certainly required to explain the following cases: (1.) X frightens away boys who are going to Y's school, and their parents keep them at home. Y has an action against X. (2.) M has a market with toll for horses sold; N is bringing a horse to market when R drives him away. M has an action against R (cited by *Ld. Holt* in *Keeble v. Hickeringill*, 11 East, 573, note).

In *Tarleton v. McGawley*, Peake, 205, the master of a vessel had an action against X for firing a cannon at negroes and preventing them from trading with the plaintiff's vessel. *Tarleton v. McGawley* is cited with approval in *Walker v. Cronin*, 107 Mass. 555. [Cf. also *Rice v. Manley*, 66 N. Y. 82.] The principle stated in *Comyns*, however, requires this qualification: the damage to the plaintiff must be the natural consequence of the defendant's act. The principle is very well stated in *Cunnington v. Great N. W. R. R. Co.*, 49 L. T. R. 392. The defendant was employed to deliver X's casks to the plaintiff, who was accustomed to fill them with ketchup. The defendant carelessly delivered other casks, which had been filled with turpentine. The plaintiff did not discover the mistake, and lost all the ketchup which he put into them. The court says: "Wherever the circumstances disclosed are such that if the person charged with negligence thought of what he was about to do, he must see that unless he used reasonable care there must be at least a great probability of injury to the person charging negligence against him, either as to his person or property, then there is a duty shown to use reasonable care."

In *Riding v. Smith*, 1 Ex. D. 91, A was held liable to B for maliciously injuring his business by slandering B's wife, C.

In the *Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265, it is intimated that, if the company had caused an accident which would result in the death of X, for the purpose of injuring Y, who had insured X's life, Y would have a right of action against the company.

As a logical result of the cases cited, it would seem to follow that if C wilfully or negligently destroyed a house owned by B, and insured by A, C would be liable to both B and A. This, however, is not the law. C is liable to B only, though A, after paying the insurance, has an equitable claim to any amount which B may collect as damages from C. It seems that the true reason for this decision is that the contract of insurance is a contract of indemnity, and by means of subrogation the insurance company is generally fully protected; hence, there is usually no need of resorting to an action on the case. But in the present case, owing to the peculiar relations between B and C, the insurance company is not protected by subrogation. It is conceived, therefore, that a strict application of the principles at the foundation of the common-law action on the case will permit the company, in place of its ordinary remedy, to proceed directly against the wrong-doer. The language of the court in *Conn. Mut. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, as far as it goes, is authority for this position.

## RECENT CASES.

CHAMPERTY.—CONTINGENT FEES.—A, a domestic servant, having no means but his earnings, employed B, an attorney, to recover A's share in his father's estate. By the terms of their agreement, A was to defray the necessary expenses of the suit, and B was to charge nothing for his services except in event of success, in which case B should be entitled "to very large and liberal fees, in no event to exceed fifty per cent. of the amount collected" by B. The suit prosecuted for A was first decided against him; but was successfully appealed. *Held*—The agreement was lawful. It lacked the essential element of champerty, *sharing* in the fruits of the litigation; it left the defendant A still personally liable for B's fee. *Blaisdell v. Ahern*, 11 N. E. Rep. 681 (Mass). For a discussion of the ethics of contingent fees, and a collection of cases on this subject, see *Sharswood's Legal Ethics* (5th ed.), pp. 153 *et seq.*

CONSPIRACY, CRIMINAL.—BOYCOTT.—A branch of the National Stonecutters' Union agreed to do no work for any shop or works disapproved of and known as "scab" by that organization, and to boycott and publish as "scabs" in the "Granite Cutters' Journal" any workmen who continued after warning to work in such shops. The results of such publication as a "scab" would be that no member of the Union would work with such a party, and work would be difficult for him to obtain. In pursuance of this agreement, by threats of publication as "scabs" the defendants actually induced certain workmen to leave the employ of the Ryegate Granite Co.

*Held*—To be settled by authority and on sound principle that the defendants were guilty of a criminal conspiracy at common law. The case collects many authorities. *State v. Stewart*, 9 Atl. Rep. 559 (Vt.).

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POWER TO BRIDGE NAVIGABLE WATERS.—The case presents the important constitutional question whether Congress can lawfully confer upon a private corporation the capacity to occupy navigable waters within a State, and appropriate the soil under them for the purpose of interstate commerce, without the consent and notwithstanding the protest of the State. It was decided that the power to build bridges, or authorize them to be built, is incidental to the general power to regulate interstate commerce. *Decker v. B. & N. Y. R. R. Co.*, 30 Fed. Rep. 723. The same question is similarly decided in *Stockton v. B. & N. Y. R. R. Co.*, 10 N. J. L. J. 273. Mr. Justice Bradley gives a vigorous opinion. "In matters of foreign and interstate commerce," says he, "there are no States." *Vide* "The Arthur Kill Bridge Case," 10 N. J. L. J. 261.

CONTRACT—COMPROMISE OF A DISPUTED CLAIM.—"The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded. The detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise."—*Grandin v. Grandin*, 9 Atl. Rep. 756 (N. J.).

However difficult to support on theory, the result would seem to be a very desirable one. If the claim must "be doubtful in law or fact," no compromise can be relied on as final till the case has been tried to see whether it is doubtful. The difficulty is in regard to the consideration. The only "alteration in position" which will always be present is the giving up of a right to litigate, and there may be a difference of opinion as to whether one has a "right" to litigate an unfounded claim. In this connection it is noteworthy that *Callisher v. Bischoffsheim*, *Ockford v. Barelli*, and *Cook v. Wright*, which had been questioned in England, were expressly approved in *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266. And the editor's note cites half a dozen recent American cases to the same effect as to the sufficiency of the consideration.

CONTRACT—CONDITIONS—MEASURE OF DAMAGES.—A contracted in writing with B to make and deliver at a certain price per ton 6,000 tons of steel rails, to be drilled as directed by B. B did not give the directions when applied to, and notified A that B would not take the rails at all. The market value of rails fell. A used up the material bought for the contract with B, in rails sold to other

parties. *Held*—A was entitled as damages to the profits he would have made had B not prevented the performance of the contract, less the profit actually made by the sales to other parties. A was not bound to make the rails as per contract with B, sell them in open market, and charge B with the difference between the amount realized and that contracted for. *Hinckley v. Pittsburgh Bessemer Steel Co., Limited*, 7 Sup. Ct. Rptr. 875.

CONTRACT—CONSIDERATION.—A agreed with B to do certain blasting and excavating of rock at a stipulated price, but finding that the rock was not as soft as represented by B, he threatened to abandon the contract on the ground of misrepresentation. B, in order to induce him to continue, promised to pay an additional compensation. A then completed the work. It was held that A was entitled to recover the additional consideration. When A completed the work he was doing that which, on account of B's misrepresentation, he was not bound to do. Hence there was a consideration for B's promise to pay the additional sum. *Parker v. Glover*, 9 Atl. Rep. 217 (N.J.).

CONTRACT—FAILURE OF PLAINTIFF TO PERFORM FULLY—LIABILITY OF DEFENDANT IN IMPLIED CONTRACT.—A contracted with B to build a church. When the building was completed it was found not to comply exactly with the specifications. But B occupied the building. B objected to the deviations as soon as they were discovered. A sues B on a count for work and materials furnished. To alter the church so as to comply with the contract would cost much more than the alteration would be worth. *Held*—That the plaintiff was entitled to recover the contract price less the diminution in value of the building by reason of the deviations. The decision goes on natural equity and recent authorities. *Pinches v. Swedish Evangelical Lutheran Church*, 10 Atl. Rep. 264.

CONTRACT—MISTAKE—FAILURE OF CONSIDERATION.—Under a contract for the sale of land, a deposit was made with a condition for forfeiture on failure to complete the contract. The vendee accepted the title, but was unable to obtain the remainder of the purchase-money at the time agreed on. The vendor, in accordance with the conditions, forfeited the deposit, and afterwards re-sold the property. Three years later, the first vendee heard that the title was found bad on this re-sale. He accordingly brought an action to recover the deposit on the ground of mutual mistake and total failure of consideration. The Court held that this would be taking advantage of his own wrong. *Soper v. Arnold*, 35 Ch. D. 384.

CONTRACT—RESCISSION—MUTUAL MISTAKE.—A bought a cow of B for \$80 both believing her to be barren. If she had been a breeder she would have been worth \$750. The sale was complete, title had passed, and an order had been given for delivery. But before actual delivery B discovered that the cow was with calf, and refused to deliver because of the mistake. *Held*—That B could rescind the sale. "A barren cow is substantially a different creature than a breeding one. She is not in fact the animal, or kind of animal, the defendant intended to sell or the plaintiff to buy." *Sherwood v. Walker*, 33 N. W. Rep. 919 (Mich.).

CONTRACT—RIGHT OF A THIRD PARTY TO SUE.—A contracted with B to "drive" B's logs a certain distance down the river. By the terms of the contract B was to furnish A the money to pay off A's men. *Held*—A's men had no rights under the contract, as it was not made for their express benefit. *Wright v. Terry*, 2 So. Rep. 6 (Fla.). The case is valuable for the editor's note, which collects many late cases.

DEED—BUILDING RESTRICTION.—A stipulation in a deed providing that land shall be used for residence purposes only, will not be enforced after the plan of confining building in that neighborhood to residences has been abandoned, and adjoining land sold without restrictions. "A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result. After treating it as void he cannot appeal to a court of equity to treat it otherwise." *Duncan v. Central Passenger R.R. Co.*, 4 S.W. Rep. 228 (Ky.).

EVIDENCE—DYING DECLARATION.—The declarant, when so far gone that he could neither feel a pencil placed in his hand nor see a light held before his eyes, was asked if he thought he would ever get well. He answered, "I don't know; I don't think I will ever get well; the doctor don't tell me much."

*Held*—The question and answer would be sufficient to show that declarant had no hope of recovery; but considering the surrounding circumstances, and the

very low condition of the deceased, of which he was manifestly conscious, "we cannot doubt that the declarations were made under a belief of a speedily impending death."—*State v. Johnson*, 9 Cr. L. Mag. 451 (S.C.).

A note collects cases. See also *State v. Newhouse*, 2 So. Rep. 799 (La.), and note.

EVIDENCE — RAPE — FRESH COMPLAINT. — The assaulted party related the particulars to her mother on the morning after the alleged assault. *Held*—Not admissible. To be admissible such statements must be contemporaneous with and illustrative of the assault, and therefore *pars rei gestæ*. *McGee v. State*, 2 S. W. Rep. 890 (Tex.). The rule has not been confined to facts which are part of the *res gestæ*, but in cases of rape the fact that the injured party has complained of the outrage at the first opportunity, may be shown as corroborating her testimony. What she said is also admissible. *Reg. v. Guttridges*, 9 Car. & P. 471; *Haynes v. Commonwealth*, 28 Grat. 942; *McCombs v. State*, 8 Oh. St. 643. See also *Dunn v. State*, 12 N. E. Rep. 826 (Ohio).

INTOXICATING LIQUORS — DAMNUM ABSQUE INJURIA. — "The local option legislation of this State being constitutional as a valid exercise of the police power, it follows that the incidental effects upon the value of property, such as a brewery and its fixtures, resulting from the inability of the owners to adjust their old business to the new law, is *damnum absque injuria*. The law does not take or damage their property for the use of the public, but only prevents them from taking or damaging the public for their use." (Syllabus.) *Menken v. City of Atlanta*, 2 S. E. Rep. 559 (Ga.).

LARCENY — WHAT CONSTITUTES? — The defendants were farm laborers, hired to pick cotton. They entered a cotton-house, carried cotton therefrom to the field, and placed it with cotton which they had picked the day before, but which had not been weighed. The intent was not to deprive the owner of the cotton, but to obtain from him compensation for picking cotton which they had not picked. *Held*—That such act has the secrecy, in fraudulent purpose, and the intent to deprive the owner of an interest in his property, elements which distinguish larceny from a civil trespass. The defendants had fraudulently taken and placed the property where they could assert a false lien on it. *Fort et als. v. State*, 2 So. Rep. 477 (Ala.).

LIBEL — PRIVILEGED COMMUNICATION — MERCANTILE AGENCY. — B, a mercantile agency, published a "Notification Sheet" giving information as to the business standing of traders, which they issued indiscriminately to subscribers. In it they stated that A had placed a chattel mortgage upon her property, which statement was false, and resulted in breaking up her business. *Held*—B was liable. The communication of the false information to those who had no interest in it was not privileged. Five of the fourteen judges dissented on the ground that communications made in good faith in the performance of what may reasonably be considered a duty to the public or an individual are privileged. "The old adjudications relied on to support the more narrow rule are the declarations of judges whose vision did not take in the widely different conditions which prevail in the affairs of men to-day." *King v. Patterson*, 36 Alb. L. J. 226 (N.J.).

LIBEL — PUBLICATION. — The libellous matter was contained in a sealed letter opened by the prosecuting witness. As he was unable to read, he gave the letter to his wife, who thereupon read the contents to him. *Held*—That, in the absence of any evidence whatever to show that the defendant knew of the prosecutor's inability to read, there was not a publication of the libel by the defendant. *State v. Syphrett*, 2 S. E. Rep. 624 (S. C.). (The count of the indictment which charged a publication to the prosecutor himself, failed because it was not charged that the defendant's act was done with the intent to cause a breach of the peace.)

LIFE INSURANCE POLICY — CHANGE OF BENEFICIARY — TRUST. — A took out a policy of insurance upon his own life, payable to his mother, who, together with A's sister, furnished the money for the first premium. Eight years later A surrendered the policy, which had been shown, but never delivered, to his mother. The policy was cancelled, and a new one in favor of A's wife was issued indorsed: "Original Pol. No. 9372 was issued May 25th, 1874, of which this is a continuation, and entitled to all its benefits." A's mother never knew of the change. A paid all the premiums after the first. *Held*—Upon A's death the entire amount of the policy was due to A's mother. The taking out the policy amounted to a settlement in trust upon the mother, and no power of revocation

was reserved. *Pingrey v. Natl. Life Ins. Co.*, 11 N. E. Rep. 562 (Mass.). The case collects the authorities upon this mooted question.

It would appear that there is difficulty in interpreting the taking out of an insurance policy into a declaration of trust. Furthermore, the only possible subject-matter of the trust would be the right of action on the policy. That right of action ceases when the payment of premiums on the policy ceases. The premiums on the second policy were intended by both payer and receiver not to be on the original policy, but upon a substituted one. The decision of the Court in effect appropriates payments made for the benefit of one party to keep alive the rights of another. It is suggested that the rights of the parties are worked out more justly on the theory not of a declared, but of a constructive, trust. The contract of insurance is a unilateral one, the consideration of which is the payment of the first premium. The contract is subject to the condition subsequent, that unless the subsequent premiums are paid, the contract shall be of no effect. The effect of the contract is the immediate vesting in the beneficiary of a right to the insurance money on the death of the insured. This right is property, and is measured at any time by the "surrender value" of the policy. When the second policy is issued, the consideration paid for it is the surrender of the old one. The right of the new beneficiary is literally purchased with the right of the old beneficiary. This amounts to the same thing as if funds of the former beneficiary amounting to the surrender value of the first policy had been misappropriated and paid as a first premium on the second policy. On the principle of following trust property, the former beneficiary should be entitled to that proportion of the insurance money which the surrender value of the first policy bears to the amount of premiums paid under the second policy.

MASTER AND SERVANT — DISCHARGE WITHOUT NOTICE. — The appointment of a manager and receiver by a Court of Chancery operates as a discharge of servants, and those entitled to notice have an action for wrongful dismissal. A servant who is retained by the manager at the same wages does not continue under the old contract, and may be dismissed without notice. — *Reid v. Explosives Company*, 19 Q. B. D. 264.

In this case the service under the manager continued through the period for which he was entitled to notice; but certain *dicta* of the judges seem to overlook the fact that the plaintiff would be entitled to nominal damages for dismissal by the appointment of a manager notwithstanding he has lost nothing.

MORTGAGE — AFTER-ACQUIRED PROPERTY. — A mortgage purporting to cover "all moneys to which the mortgagor might during the continuance of the security become entitled under any will or other document" will be enforced in equity as to a share of a testator's residuary estate to which the mortgagor became entitled after the date of the mortgage, on the ground of specific performance of a contract. — *In re Clarke*, 35 Ch. D. 109.

MURDER — DEATH CAUSED BY NEGLIGENCE. — Defendant was the husband of the deceased, who was weak, feeble, and unable to walk. Defendant left her exposed in the night-time to the cold and inclemency of the weather, though perfectly able to take care of her. From this exposure death ensued. *Held* — That this was murder under a statute providing that "murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." *Territory v. Manton*, 14 Pac. Rep. 637 (Mon. Ter.).

NEGLECT — BURDEN OF PROOF. — Plaintiff's mare was run over by defendant's train. *Held*, That when he had proved the facts of the killing, the burden was shifted to the defendant to show that it was not through negligence. Alabama cases the only authorities cited. *South & North A. R. Co. v. Bees*, 2 So. Rep. 752 (Ala.). Compare *Early v. L. S. & M. S. R. Co.*, 66 Mich. 349.

NEGLECT — PROXIMATE CAUSE. — By the negligence of railroad employees a cow is thrown from the track, and bouncing, injures the plaintiff. *Held*, The negligence is a proximate cause of the injury and company is liable. *Ala. G. S. R. Co. v. Chapman*, 36 Alb. L. J. 222 (Ala.)

NOTICE — QUITCLAIM DEED. — The holder of a quitclaim deed is not a purchaser without notice of adverse equities concerning which he could obtain information by reasonable diligence, in searching and inquiry. In nearly all cases of transfer of land in Kansas warranty deeds are used; only in cases of doubt are quitclaim deeds resorted to. *Johnson v. Williams*, 36 Alb. L. J. 238 (Kan.).

**SALE — UNASCERTAINED GOODS.** — The vendor sold 25,000 hedge plants to plaintiff and 57,000 to defendant, to be delivered at defendant's place of business. The 82,000 were so delivered, and, without making any selection, defendant disposed of all of them. Plaintiff sues for the conversion of 25,000. *Held* — The action lies. "Where the property sold is a part of an ascertained mass of uniform quality and value, separation is not essential, and the title to the part sold will pass to the vendee, if such appears to be the intention of the parties." *Kingman v. Holmquist*, 24 Rep. 332 (Kan.).

**STATUTE OF FRAUDS — PAROL AGREEMENT FOR AN EASEMENT.** — A verbal agreement for an easement of light is probably within the 4th section of the Statute of Frauds; but whether it is or not, it will be enforced in equity after part performance. — *McManus v. Cook*, 35 Ch. D. 681.

**STATUTE OF FRAUDS — SALE OF CHATTEL — EXECUTORY CONTRACT.** — A contracted to paint and frame a portrait of two children for B. B refused to receive the portrait when completed. *Held* — The contract was not one for a chattel, but one for work and labor. "The whole value was to arise out of the work of the artist on materials of no particular value." *Turner v. Mason*, 32 N. W. Rep. 846 (Mich.). The case is not in accord with the simpler English rule, *Lee v. Griffin*, 1 B. & S. 272.

**TORT — WRONGFUL INTERFERENCE.** — A was in the employ of B as general superintendent of B's brick business, under a contract of service for no definite period. C, general manager of a railroad, by refusing to furnish B a side-track to his brick-yard (which C had previously promised to do) unless A was discharged from B's services, procured A's discharge. *Held* — C was liable to A in damages. The case cites and comments upon a number of the few cases upon this interesting tort. *Chipley v. Atkinson*, 1 So. Rep. 934 (Fla.).

**TRUST — IMPERFECT GIFT.** — A father, desiring to make his daughter a present, bought \$2,000 worth of bonds, but, at her request, kept them himself and remitted the interest to her. On his death, *held* — She cannot recover from the administrators. A gift is not complete without delivery of the *res*, and the Court will not make a valid trust out of an imperfect gift. *Flanders v. Blandy*, 24 Rep. 311 (Ohio).

**TRUST — TRUSTEE OR DEBTOR.** — A bank at A sent to the bank at B a bill for collection. The bill was paid, the money mingled with the other money of the B bank, and, pending remittance, credit was given on the books for the amount. The banks had no mutual account. The B bank then went into the hands of a receiver, who asks the Court if he is to pay the A bank in full or *pro rata* with other creditors. *Held* — He shall pay it in full. "No difficulty whatever arises from the confusion of these moneys, any more than in every other case where the rightful owner is in pursuit of trust-funds. In such case the owner need not point out the very goods, or bills, or coin. He does all the law requires if he shows that the goods, or bills, or coin came to the hands of the defendant impressed with a trust to his knowledge. In every such case the holder must respond either in the article taken or its value." *Thompson v. Gloucester City Savings Institution*, 24 Rep. 182 (N. J. Ch.). It seems difficult to support this decision on the principle of a trust. The Court admit that the trust-fund could not be followed after the confusion of the money. The assignee has the title to no specific thing into which the fund is known to have gone, and to which a trust can attach. Hence, one of the essential elements of a trust, *viz.*, a *res* with reference to which the relation of trustee and *cestui que trust* can exist, is lacking, and the assignee took the property free from the trust. At the same time it does not follow that the creditors of the B bank are entitled to have property applied to the payment of their debts which was never intrusted to the credit of the bank, and property which, except for its peculiar nature, would have been held in the capacity of an agent simply. It is contrary to all equity that they should thus be enriched at the expense of others. This should have been the ground of the decision.

**WITNESS — EXPERT — REFUSAL TO ANSWER.** — A physician upon the stand as an ordinary witness refused to answer a question upon the ground that it was one involving expert evidence. *Held* — He must answer, though he was not called or paid as an expert. *State v. Teipner*, 36 Alb. J. 199 (Minn.).

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## WHAT IS THE TEST OF A REGULATION OF FOREIGN OR INTERSTATE COMMERCE?

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NO class of cases are more perplexing than those involving the distinction between the power of Congress to regulate foreign or interstate commerce and the so-called police power of the States. It has always been conceded that there were many kinds of laws, such as quarantine laws, health laws, etc., operating upon foreign or interstate commerce, which were within the power of the States. How are such laws to be distinguished on principle from regulations of foreign or interstate commerce within the exclusive power of Congress? On this point the more recent cases are very unsatisfactory. While these cases almost always commend themselves to our common sense as actual decisions upon the facts, the reasoning upon which the decisions are based is meagre and unsatisfactory; indeed, very little general reasoning is attempted. The court almost invariably confines itself to a decision upon the facts involved.

The cause of this hesitancy of the judges to lay down general principles upon the distinction between laws affecting foreign or interstate commerce, which are within the powers of the States, and those which are regulations of foreign or interstate commerce, and within the exclusive power of Congress, is, in the opinion of the writer, to be ascribed to the confusion in which the law was left by

certain of the earlier cases, in which the controversy over the question whether the commercial power of Congress was "concurrent" or "exclusive" was carried on. This controversy was really political in its nature. It involved directly the great question of "State" or "national" sovereignty, the burning question of the time. The political bearing of the controversy accounts for the bitterness with which it was carried on, and the extreme confusion in which it left the law upon all questions involved in it. Fortunately, this controversy did not begin in the earliest cases decided by the Federal Supreme Court, involving the distinction between laws affecting foreign or interstate commerce and laws which are regulations of foreign or interstate commerce, and it is these earliest cases which, in the opinion of the writer, contain the true principles upon the subject.

In this article, then, the writer proposes to take up these earliest cases, and analyze them, with the view of coming at the precise principle which they lay down for distinguishing laws affecting foreign or interstate commerce, but which are not regulations of such commerce, from true regulations of foreign or interstate commerce; then to pass to the cases in which the great controversy over "exclusiveness" or "concurrency" of the commercial powers of Congress was carried on, and endeavor to point out certain elements of confusion introduced by these cases into the law; and lastly, to take up some of the more important cases and clauses of cases since decided by the Federal Supreme Court, and study them with the view of ascertaining how far, if at all, they modify or alter the principles of law laid down in the earliest cases, and what the law is at present in the light of recent decisions.

The first case in which the Supreme Court of the United States construed the clause in the Federal Constitution conferring power upon Congress to regulate commerce with foreign nations and among the several States, and with the Indian tribes, was the great case of *Gibbons v. Ogden*, 9 Wheat. 1, in which Chief-Justice Marshall delivered the opinion of the Court, after listening to the arguments of some of the ablest constitutional lawyers of the day, including Daniel Webster. That case involved the validity of a law of the State of New York, granting to certain persons the exclusive right to navigate all navigable waters of the State in vessels propelled by steam. The owners of this exclusive right had obtained an injunction from a New York Court restraining



the defendant, who owned a steam-vessel, enrolled as a coaster under the laws of the United States, from sailing his vessel upon New York waters. The State courts all upheld the validity of the law, and an appeal was prayed to the United States Supreme Court. The Supreme Court sustained the appeal, and declared the law invalid, in as far as it applied to the defendant's vessel. The actual decision of the Court was as follows: First, that the Federal coasting license laws were valid as an exercise by Congress of its powers to regulate interstate commerce; second, that those laws conferred upon vessels duly enrolled under them the right to navigate all navigable waters of the United States; third, that all valid enactments of Congress superseded and abrogated all State legislation inconsistent with them, and that, therefore, the New York law was invalid in so far as the exclusive privileges of navigation conferred by it operated to exclude licensed coasters from navigating the waters of the State.

This is all that was actually decided by the case,—that laws passed by Congress in exercise of its commercial powers were paramount to conflicting State legislation. The opinion of the Court, however, discusses at length the question with which this article is concerned,—the principle upon which to distinguish between the commercial power of Congress and the “police” powers of the States. In the course of the argument the defence raised the point that the New York law was a regulation of commerce, and that the power to regulate commerce was “exclusive” in Congress. The opposite side met this argument by denying that the commercial powers of Congress were “exclusive.” In support of their position that the powers to regulate foreign or interstate commerce was possessed by the States concurrently with Congress, they instanced quarantine laws, inspection laws, health laws, etc., as being laws which were regulations of foreign or interstate commerce, but which were, nevertheless, confessedly within the powers of the State to enact. This argument in favor of “concurrency,” based upon State quarantine laws, health laws, etc., was discussed at length by Chief-Justice Marshall in his opinion, and although he finally declined to pass upon the question of “concurrency” or “exclusiveness,” and decided the case upon the ground stated above, this discussion is most valuable as suggesting the principle upon which to distinguish between laws affecting or operating upon foreign or interstate commerce which are, from those which

are not regulations of foreign or interstate commerce. The learned Chief-Justice met this argument in favor of concurrency by denying that the State laws adduced as instances of regulations of foreign or interstate commerce, enacted by the States were, in fact, regulations of such commerce. He points out that although quarantine laws, health laws, etc., may operate directly upon foreign or interstate commerce, it by no means follows that such laws are regulations of foreign or interstate commerce,—that the means employed in the exercise of entirely distinct sovereign powers may be the same, or nearly the same. Hence it follows that the operative effect of a law furnishes no certain criterion by which to decide from what sovereign power it emanated ; and the fact that a State quarantine law operates upon foreign or interstate commerce, and contains provisions within the power of Congress to enact by virtue of its commercial powers, by no means proves that it is a regulation of foreign or interstate commerce. The following extract from the opinion of the Court clearly brings out the views expressed by the learned Chief-Justice :—

“ It is obvious that the Government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers, that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the powers expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers ; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.”

How, then, are we to tell, in doubtful cases, to which of two or more possible sovereign powers a given law is to be ascribed? The answer is not far to seek, — from the object or aim of the Legislature in passing the law. This is clearly implied from the language of Chief-Justice Marshall, above quoted. He treats sovereign powers not as rights to use prescribed means, but as rights to aim at prescribed ends. In his view, the power to regulate foreign or interstate commerce did not confer upon Congress the power to enact laws containing provisions of some prescribed character, but to aim at the accomplishing of a general result by any legislative means whatsoever. It follows, then, that to test whether a given law is to be regarded as a regulation of foreign or interstate commerce, we must examine the object of the Legislature in passing the law. If the law was passed for the sake of the effect which it was to have upon foreign or interstate commerce, it must be regarded a regulation of such commerce; but if not, then the law is not to be regarded as a regulation of foreign or interstate commerce, although it may operate upon and affect such commerce in an important degree, the operative effect of the law being immaterial in deciding the question, except in so far as it throws light upon the intention of the Legislature.

All this, which is implied in, and is easily deducible from, the above-quoted language of Chief-Justice Marshall, is even more plainly brought out in the following extract from the separate opinion of Johnson, J., who held that the commercial powers of Congress were exclusive, and the New York law unconstitutional, as infringing upon them. He says: —

“Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct.” The words “frankly exercised” plainly indicate that, in the learned judge’s opinion, the intention of the Legislature in framing a given law determined the sovereign power to which it must be ascribed.

Having developed thus fully the views of Chief-Justice Marshall in *Gibbons v. Ogden*, we can now pass to the case of *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, a case which has given subsequent judges very great difficulty, and which many have deemed irreconcilable with the decision in *Gibbons v. Ogden*. In that case, the State of Delaware had authorized a company to

dam a small navigable tidal creek, for the purpose of reclaiming marsh land and improving the drainage of the surrounding territory. Willson, the owner of a sloop licensed as a coaster, had run into the dam with his vessel and injured it. In an action for damages for this injury, Willson set up that the law authorizing the dam was unconstitutional as infringing upon the powers of Congress to regulate foreign and interstate commerce, which, he contended, was "exclusive." The Court held that the law was not unconstitutional. The opinion of the Court, which was very brief, was delivered by Chief-Justice Marshall. The following extract gives the substance of it: "The act of Assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the State. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should not feel much difficulty in saying that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh

Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

What is the true explanation of this case? Some judges have declared that it can be explained only upon the theory that the power to regulate foreign and interstate commerce is "concurrent," — to some extent, at least. This explanation of the case is a very improbable one. The Court, in *Gibbons v. Ogden*, although it did not decide that the commercial powers of Congress were exclusive, certainly showed a leaning in favor of that view; and Johnson, J., in his separate opinion, held squarely that that power was "exclusive." It is unreasonable to suppose that Chief-Justice Marshall would have decided in favor of the concurrency of the commercial power of Congress, without one word of comment upon the case of *Gibbons v. Ogden*, or that Johnson, J., would have joined in the opinion, had he supposed it so to decide. There is certainly no language in the opinion which expressly lays down the doctrine that the congressional commercial power is concurrent, wholly or in part. A much more satisfactory explanation of the case is that the Court intended to decide that the law was not a regulation of foreign or interstate commerce, because, although it no doubt operated to exclude foreign or interstate navigation from Black Bird Creek, it was passed with quite another purpose; namely, to enhance the value of property adjoining the creek, and to improve its drainage and sanitary conditions: that the State law, not being a regulation of foreign or interstate commerce, was also not in conflict with any Federal law passed by Congress, by virtue of its commercial power; and that, therefore, the law was perfectly valid under the commercial clause of the Constitution. This explanation makes the case consistent with everything the Court said in *Gibbons v. Ogden*. It is, moreover, entirely in harmony with the language of the opinion. In the opinion the Court point out the objects of the State law, and hold that "measures calculated to produce these objects" are within the powers of the State, unless conflicting with powers of the general government, and that the law in question did not, under all the circumstances of the case, come in conflict with "the power to regulate commerce in its dormant state," or with any law passed by Congress by virtue of that power.

The next case that we need consider is the case of *City of New York v. Miln*, 11 Pet. 102. That was the first case in which the judges of the Federal Supreme Court differed as to the validity of a State law, under the commercial clause of the Federal Constitution. In that case was involved the validity of a law of the State of New York, requiring the masters of all vessels arriving in the city of New York from the ports of other countries or States to make to the city authorities, within twenty-four hours of arriving, a written report containing the names, ages, and last places of settlement of all passengers landed in the city from their respective vessels. It was held that this law was not unconstitutional under the commercial clause of the Constitution, because it was not a regulation of foreign or interstate commerce, but a "police measure." Judge Barbour, who delivered the opinion of the Court, called attention to the reasoning in *Gibbons v. Ogden*, as justifying "measures on the part of the States, not only approaching the line which separates regulations of commerce from those of police, but even those which are almost identical with the former class, if adopted in the exercise of one of their acknowledged powers;" and quotes largely from Chief-Justice Marshall's opinion. Justice Story dissented, being of opinion that the State law was a regulation of foreign and interstate commerce, since it operated upon such commerce, and that the power to regulate foreign and interstate commerce was exclusive in Congress. He reasons that the law in question was a regulation of interstate and foreign commerce, because it was such a law as Congress might have passed by virtue of its commercial powers; and failed to grasp the principle laid down in *Gibbons v. Ogden*, and relied on in the majority opinion, that the same enactment may be ascribed to entirely distinct sovereign powers, according to the intention of the Legislature in passing it.

We now come to two cases — the License Cases, 5 How. 504, and the Passenger Cases, 7 How. 283 — which more than any others are responsible for the confusion and uncertainty in which the law relative to the distinction between the commercial power of Congress and the police power of the States is involved. Up to the time when the case of *New York v. Miln* was decided, the question of the concurrency or exclusiveness of the commercial power of Congress had given the Supreme Court no great difficulty. The Court, it is true, had declined to pass upon the question in advance of a case which, in their opinion, raised it; but it can hardly be doubtful

what their decision would have been had such a case come before them. During the ten years that elapsed between the decision in *New York v. Miln*, in 1837, and that in the License Cases, which were decided in 1847, circumstances had changed materially. In the first place, the question of State or national sovereignty had become much more prominent, in the ripening of events which afterward brought about the civil war. In the next place, there had been a great change in the *personnel* of the Supreme Court, and among the new judges were many advocates of the extreme State rights theory. These judges seized upon the License Cases and Passenger Cases as opportunities for committing the Supreme Court to the view that the commercial power of Congress was "concurrent" and not "exclusive,"—that view being consonant with their theory of State rights. They fought the fight in favor of "concurrency" with the zeal and fervency of intense conviction, and pressed into service every argument they could think of to support their cause. This vigorous onset of the State rights judges threw the Court into confusion. Some of the judges, who were not prepared to accept the view that the commercial power of Congress was "concurrent," were yet not prepared to commit themselves to the view that that power was "exclusive" and sought to avoid any decision of the question of "exclusiveness" or "concurrency." Other judges boldly came out in favor of the view that the power was "exclusive" in Congress. The result was that in both of those cases most of the members of the Court delivered lengthy separate opinions; each judge who delivered an opinion giving his individual position upon the question of "concurrency" or "exclusiveness," and arguing at length in support of it, any impartial or dispassionate examination of the question being almost impossible, owing to its vital political bearings.

With the License Cases and Passenger Cases we should not in this article be concerned, had they been taken up with a discussion of the question of "concurrency" or "exclusiveness" merely, for subsequent cases have since conclusively settled that the power is to a large extent, at any rate, "exclusive." But in that discussion the further question became involved of what constitutes a regulation of foreign or interstate commerce, and in this aspect those cases are of very great importance to us. This latter question became involved in the following way: We have seen that, at the time the case of *Gibbons v. Ogden* was before the Court,

the power of the States to pass laws affecting foreign or interstate commerce, such as quarantine laws, health laws, etc., was conceded, and the Court in that case explained those laws as emanations from the reserved powers of the States, and not as regulations of foreign or interstate commerce. The temptation to use such laws as an argument in favor of the "concurrency" theory was too strong for some of the judges to resist. They accordingly abandoned the explanation given in *Gibbons v. Ogden*, and held boldly that such State laws were regulations of foreign or interstate commerce, because operating upon or affecting such commerce, and argued from their admitted validity that the power to regulate foreign or interstate commerce must be "concurrent." This argument has had a very important influence upon the law, in that it has tended to obscure and overthrow the distinctions taken in *Gibbons v. Ogden*, heretofore adverted to, and has been, in the opinion of the writer, the fruitful source of error and confusion. It therefore becomes necessary to study with care the License Cases and the Passenger Cases, to see how far this argument obtained the assent of the Court, and how much authority it derives from those cases.

The License Cases involved the validity of State liquor license laws, which, it was claimed, were unconstitutional, in so far as they operated to impose a burden upon the sale of liquor brought into the State from without. The entire Court sustained the validity of the laws, but the judges were by no means agreed as to the reasons upon which the decision should be based. Justices McLean and Grier reached the conclusion that the laws in question were not regulations of foreign or interstate commerce, and that therefore no constitutional objection could be raised against them under the commercial clause of the Federal Constitution. This view of the case would seem to commend itself to reason and good sense. It did not, however, satisfy some of the "States rights" judges in the Court. Chief-Justice Taney took the position that the State laws were regulations of foreign or interstate commerce, in so far as they operated to impose burdens upon the sale in original packages of liquor brought into the State, but that the power to regulate foreign or interstate commerce was "concurrent," and that, consequently, the laws were valid. Justice Catron delivered an opinion agreeing in substance with that of Taney, C. J.



Justice Woodbury, in his opinion, agreed with Justices McLean and Grier that the laws in question were not regulations of foreign or interstate commerce, but maintained, with Chief-Justice Taney, that the power to regulate foreign or interstate commerce was concurrent. Justice Daniel, in his separate opinion, also agreed with Justices McLean and Grier that the laws in question were not regulations of foreign or interstate commerce. As to the question of "concurrency" or "exclusiveness," his leaning appears to have been in favor of "concurrency," although the opinion is not at all explicit upon this point. Of the two opinions, in which it was held that the State laws were regulations of foreign and interstate commerce, and that the power to regulate such commerce was "concurrent," that of Taney, C.J., is far the abler. He boldly lays down the doctrine that, upon the question whether a State law is or is not a regulation of foreign or interstate commerce, the object and motive of the State are of no importance and cannot influence the decision. That the operative effect, and not the motive or aim of the law determines whether or not it is a regulation of foreign or interstate commerce. Starting from this premise, he argues successfully that quarantine laws, pilotage laws, and other similar laws, operating directly upon foreign or interstate commerce, are regulations of such commerce, and that, since it is admitted that the States may pass quarantine laws, pilotage laws, etc., it follows that they possess concurrent powers of regulating foreign and interstate commerce.

Granting the learned Chief-Justice his premise, his reasoning is unanswerable. The difficulty is with his premise, which is directly opposed to the doctrine so clearly brought out in *Gibbons v. Ogden*, that the intention or purpose, and not the operative effect, of a law determines whether or not it is a regulation of foreign or interstate commerce. He makes an elaborate attempt to explain that case. He admits that "one or two passages in that opinion (in *Gibbons v. Ogden*), taken by themselves, and detached from the context, would seem to countenance this doctrine" (of the exclusive power of Congress), but maintains that these passages were in answer to the argument of counsel for *equal* "concurrent" powers in the State and Federal governments, and were merely intended to meet that argument, and not to deny to the States "concurrent powers" subordinate to the paramount power of Congress, whenever Congress should see fit to exercise that power. He

asserts that the case, as a whole, is in favor of a subordinate "concurrent power" in the States; and instances in support of this assertion the admission of the Court on pp. 205, 206, that a State may, in the execution of its police and health powers, pass laws operating directly upon foreign or interstate commerce. This argument in favor of "concurrent power" in the States, based on the language of Chief-Justice Marshall, entirely overlooks the distinction taken by him, and heretofore adverted to, that identical or very similar measures may emanate from entirely different sovereign powers, and that therefore the admitted validity of State laws, such as quarantine laws or pilotage laws, operating upon foreign or interstate commerce, and containing provisions such as Congress might enact by virtue of its commercial power, by no means proved that the State had concurrent power to regulate foreign or interstate commerce.

The opinion of Catron, J., adds nothing to the reasoning of Taney, C.J., and therefore may be passed over. The opinion of McLean, J., is not particularly noteworthy. It sustains the State law as a valid police regulation, but does not go into the general question of the distinction between police regulations and regulations of foreign or interstate commerce. Woodbury, J., in his opinion, seems clearly to recognize the intention of the Legislature in passing any given law as the ultimate test of whether it is a regulation of foreign or interstate commerce. Thus he says: "In settling the question whether these laws impugn treaties or regulate either foreign commerce or that between the States, or impose a duty on imports, ordinary justice to the States demands that they be presumed to have meant what they profess, till the contrary is shown. Hence as these laws were passed by States possessing experience, intelligence, and a high tone of morals, it is neither legal nor liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect a revenue by a duty on foreign imports; thus imparting to them a different character from that professed by their authors, or from that which by their provisions and tendency they appear designed for. These States are as incapable of duplicity or fraud in their laws, or meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other

designs, and to construe their legislation as of a sinister character, which they never contemplated." This language seems to make the object or purpose of a law the criterion of the sovereign power to which it is to be ascribed, and fully to harmonize with the principles laid down in *Gibbons v. Ogden*.

In the Passenger Cases, 7 How. 283, the validity of laws of Massachusetts and New York, imposing a tax upon every non-resident passenger landed within the State from every vessel arriving from a port of some other State or country, was involved. It was held by a divided Court, five judges against four, that the laws in question were invalid. All of the judges who delivered separate opinions in the License Cases delivered separate opinions in the Passenger Cases; and, in addition, Wayne and McKinley, JJ., who delivered no separate opinions in the former case, delivered separate opinions in the latter. The opinions in the Passenger Cases are substantially similar to the opinions delivered by the same judges in the License Cases, in as far as their general reasoning upon the question of "concurrency" or "exclusiveness" of the commercial powers of Congress is concerned. McLean, J., held that the laws were regulations of foreign and interstate commerce, that the power to regulate such commerce was "exclusive" in Congress, and that the laws were, consequently, unconstitutional. Wayne, J., favored the views of McLean, J., but preferred to rest his opinion that the laws were invalid upon the ground that they were in conflict with provisions of certain Federal laws and treaties. This opinion was substantially concurred in by Catron, McKinley, and Grier, JJ. Taney, C. J., upheld the validity of the laws chiefly upon the ground that the right of the States to determine what persons should be admitted within their boundaries was paramount to any Federal powers conferred by the Constitution, and that the right to impose a tax upon all persons admitted into the State was included in this right. He also took occasion to reiterate the views expressed by him in the License Cases as to the "concurrency" of the commercial powers of Congress. Daniel, J., was of opinion that the laws were not regulations of foreign or interstate commerce, and hence were not unconstitutional, even assuming the commercial powers of Congress to be exclusive. He was also of opinion that they did not conflict with any Federal laws or treaties.

By far the most able opinion delivered in the case was the

opinion of Woodbury, J. He concurred with Taney, C. J., as to the paramount right of the States to regulate the admission of persons within their boundaries, and also as to the "concurrency" of the power to regulate foreign and interstate commerce. He agreed with Daniel, J., that the laws in question were not regulations of foreign or interstate commerce. The part of his opinion in which he maintains that the laws are not regulations of foreign or interstate commerce is very valuable as reiterating and developing the principles stated in *Gibbons v. Ogden*. He took the position that the laws were not regulations of commerce, because not passed for the purpose of regulating it, but for an entirely different purpose. The following extracts from the opinion show clearly the views entertained by the learned judge:—

"This statute does not, *eo nomine*, undertake 'to regulate commerce,' and its design, motive, and object were entirely different." . . . "Many subjects of legislation are of such a doubtful class, and even of such an amphibious character, that one person would arrange and define them as matters of police, another as matters of taxation, and another as matters of commerce. But all familiar with these topics must know that laws on these by States for local purposes, and to operate only within State limits, are not usually intended, and should not be considered, as laws 'to regulate commerce.' They are made entirely *diverso intuitu*." . . . "To regulate is to prescribe rules, to control. But the State, by this statute, prescribes no rules for the 'commerce with foreign nations.' It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter,—one in which she, as a State, has the deepest interest, and one arising after the voyage has ended, and not a matter of commerce or navigation, but rather of police, or municipal, or taxing supervision." . . . "These things are done, as Mr. Justice Johnson said in another case (*Gibbons v. Ogden*), 'with a distinct view' (from regulating commerce). And it is no objection that they 'act on the same subject,' or, in the words of Chief-Justice Marshall, 'although the means used in their execution may sometimes approach each other so nearly as to be confounded.' But where any doubt arises, it should operate against the uncertain and loose, or what the late Chief-Justice called 'questionable,' power to regulate commerce, rather than the more fixed and distinct police or taxing power."

All this is in full accordance with the doctrine of *Gibbons v. Ogden*, that Congress in exercising its powers of commercial regulations, and the States in exercising other sovereign powers reserved to them, may pass laws substantially similar or even identical in their provisions. Furthermore, it states expressly the principle, necessarily implied in this doctrine, that in all doubtful cases the intention of the Legislature must be looked to, to determine whether the given enactment is a regulation of foreign or interstate commerce, or an emanation from some other sovereign power; and that where the law purports to emanate from a well-recognized power possessed by the States, it should not be held a regulation of foreign or interstate commerce, unless the intention to regulate such commerce is clearly shown.

The result, then, of the License Cases and Passenger Cases, as far as they bear upon the question of what constitutes a regulation of foreign or interstate commerce, seems to be simply this: Chief-Justice Taney, in both cases, lays down the doctrine that any law which directly affects foreign or interstate commerce is a regulation of such commerce, and that the intention with which the law was passed is entirely immaterial. Justice Woodbury maintains the theory that a State law operating upon foreign or interstate commerce cannot be deemed a regulation of such commerce when passed *diverso intuitu*; or, in other words, that the purpose and not the operative effect of the law determines whether it is a regulation of foreign or interstate commerce or not. The other judges do not go into any general reasoning upon the subject.

The next case that we need consider is the case of *Cooley v. Board of Port Wardens*, 12 How. 299. In that case the long controversy over the question of concurrency or exclusiveness was at last settled. The Court reached the conclusion that the power to regulate foreign or interstate commerce was partly exclusive and partly concurrent. The case involved the constitutionality of a State pilotage law. The Court sustained the constitutionality of the law on the ground that the power to regulate foreign or interstate commerce was concurrent, as far as it concerns regulations local in their operation and effect, and that the pilotage law was a regulation of that character. The Court, in this case, lay down the principle that the power to regulate foreign or interstate commerce is in part "exclusive" and in part "concurrent," — "exclusive" as to subjects of the power in their nature

national, or admitting only of one uniform system or place of regulation ; and "concurrent " as to all other subjects.

This decision appears to be a compromise decision. It appears to settle the old controversy as to "exclusiveness " or "concurrency," partly in favor of "exclusiveness " and partly in favor of "concurrency." That the commercial powers of Congress are to a large extent "exclusive " was definitively established by the case, and has never since been questioned. The chief difficulty is to fix with exactness the limits of that "exclusive " power under the decision. It is said that the "exclusive " power of Congress extends to all subjects of the power to regulate foreign or interstate commerce which are national in their nature, or admit of a uniform system of regulation. Now, it is extremely difficult to fix what the Court meant by subjects "national in their nature." Perhaps we can best ascertain the limits which the Court intended to fix for the "exclusive " powers of Congress by looking at the question from the other side, and examining the class of laws which have been deemed to fall within the "concurrent " power of the States. In *Cooley v. Board of Wardens* the Court held that pilotage laws fell within the concurrent power. In subsequent cases laws authorizing the bridging of navigable streams (*Gilman v. Philadelphia*, 3 Wall. 713), harbor improvement laws (*County of Mobile v. Kimball*, 102 U. S. 691), and quarantine laws (*Morgan's S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455) have been held to be emanations from the "concurrent " power of the States to regulate foreign and interstate commerce. In regard to quarantine laws, bridge laws, and harbor improvement laws, they would seem clearly to belong to that class of laws which affect or operate upon foreign or interstate commerce, but which, according to the principle laid down in *Gibbons v. Ogden*, are not regulations of such commerce, because not passed with the intention of regulating it. The same thing seems to be true of pilotage laws, although Chief-Justice Marshall, in *Gibbons v. Ogden*, classed them as regulations of foreign or interstate commerce. Such laws are regulations of commerce, unquestionably, but not of foreign or interstate commerce, if an intention or aim to regulate foreign or interstate commerce is to be regarded as the test. They are intended to impose restrictions upon the navigation of ports or harbors of the State, their object being to render such navigation more safe. As far as the navigation within the State is a part of foreign or

interstate navigation, the laws undoubtedly affect interstate or foreign commerce ; but the intention being to impose restrictions upon the part of the navigation taking place within the State only, the laws should be regarded as regulations of domestic, and not of foreign or interstate commerce. If, then, the laws above cited fairly illustrate the class of laws which are to be deemed to fall within the concurrent power under the case of *Cooley v. Board of Wardens*, it would seem that they are the same as the class of laws affecting foreign or interstate commerce, which, according to *Gibbons v. Ogden*, are not regulations of foreign or interstate commerce, because passed *diverso intuitu*. In this view of the case it practically decides that the commercial powers of Congress are wholly "exclusive," assuming the correctness of the principles laid down in *Gibbons v. Ogden*, since the "concurrent power" which the case decides that the States possess, is, in reality, not a power to regulate foreign or interstate commerce.

The distinction stated by the Court in *Cooley v. Board of Wardens* may have been suggested by language of Woodbury, J., in his opinion in the License Cases. As was above stated, he advocated the doctrine of the concurrency of the commercial power of Congress. At the same time, he was compelled to admit that powers were conferred upon Congress by the "commerce" clause of the Constitution which, in the nature of things, the State could not exercise. The power of the States must necessarily be limited to the enactment of regulations of foreign or interstate commerce operating upon subjects within their territorial limits. The power to pass general regulations of commerce operative throughout the entire country must, of course, be exclusive in Congress. In this view, it might properly be said that the distinction between the exclusive power and the concurrent power was that the former extended to all subjects national in their nature, or admitting of uniformity of regulation, and that the latter included everything else. But it seems clear that the case of *Cooley v. Board of Wardens* does not intend to distinguish between the "concurrent" and "exclusive" powers upon the basis of the territorial operation of the law. If it did, the case must be deemed overruled in that regard. Many State laws, strictly local in their operation, have been held unconstitutional as regulations of foreign or interstate commerce. Thus, in *Welton v. State of Missouri*, 91 U. S. 275, a State law imposing a license tax upon all persons ped-

dling within the State the products or manufactures of other States or countries, was held unconstitutional as a regulation of commerce ; yet the operation of the law was clearly local.

We have now completed our examination of the six earliest cases decided by the Federal Supreme Court in which the distinction between laws which affect foreign commerce, and laws which are regulations of foreign or interstate commerce, is discussed, and we have seen that these cases lay down the principle that the object or aim of the Legislature in passing the law is the true ground of distinction, in so far as they lay down any well-defined principle at all.

Let us now consider how far, if at all, that principle has been modified by subsequent cases. The principle that the intention or purpose of the Legislature in passing it is the true criterion of whether a law is a regulation of foreign or interstate commerce or not, has been clearly established by the more recent cases to this extent, that a law operating upon foreign or interstate commerce, which is ostensibly passed in exercise of some reserved power of the State, but really for the sake of its effect upon foreign or interstate commerce, is deemed a regulation of foreign or interstate commerce. Thus, in *Welton v. Missouri*, 91 U. S. 275, a State law purporting to be a law for the licensing of peddlers, but which contained provisions discriminating against the products and manufactures of other States or countries, when sold by peddlers within the State, was held unconstitutional as a regulation of foreign and interstate commerce. So in the recent case of *Walling v. Michigan*, 116 U. S. 465, a law purporting to impose a license tax upon persons engaged in selling liquor within the State, but so drawn as to discriminate in favor of liquor manufactured in the State, was held a regulation of interstate and foreign commerce, and unconstitutional. A still more striking case is the recent case of *Robbins v. Shelby Taxing District*, 120 U. S. 489, in which a license tax imposed by Shelby Taxing District (the City of Memphis) on all persons selling goods in the district by sample, and not having regularly licensed houses of business there, was held unconstitutional, as being passed with the intention of discriminating against commercial houses of other States doing business in Memphis.

But while it is clear that the modern authorities fully support the doctrine that the real purpose or object of a law is the criterion of



the sovereign power to which it is to be ascribed, to this extent, that a State law passed with the real intention of regulating foreign or interstate commerce will be deemed a regulation of such commerce, whatever the ostensible purpose as stated in the title may be, it is by no means clear that the converse of this proposition—that a State law, not passed with the intention of negotiating foreign or interstate commerce, cannot be deemed a regulation of such commerce, whatever the nature of its provisions may be—can be regarded as law in the light of the modern decisions. Indeed, there are a good many dicta, and even some decisions, which seem to indicate that it is not law. These dicta and decisions seem to support the view that a State law operating upon foreign or interstate commerce, but passed to accomplish some object or aim within the well-recognized power of the State, and without any intention of regulating foreign or interstate commerce, will, nevertheless, be held to be a regulation of such commerce, if, in the opinion of the Court, the law affects foreign or interstate commerce to a greater degree than is necessary for the accomplishment of the object aimed at. It cannot be said that the above view is anywhere distinctly stated. The modern cases upon the commerce clause of the Constitution do not contain statements of general propositions of law. Still, it must be admitted that there are dicta, and perhaps some decisions even, which seem to favor that view. Thus, Strong, J., in delivering the opinion of the court in *Railroad Co. v. Huesen*, 95 U. S. 465, says, in speaking of the powers of a State: "While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection." So Miller, J., in *Chy Lung v. Freeman*, 92 U. S. 275, a case involving the validity of a "passenger law," says: "We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond

what is necessary, or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified."

These dicta appear to point in favor of the view above stated. Some decisions, too, seem to point the same way. Thus, in *Railroad Co. v. Huesen*, 95 U. S. 465, a State law prohibiting the importation into the State of Spanish, Mexican, or Indian cattle from the first of March to the first of November of each year, apparently passed for the sole purpose of protecting the State from the infections of a cattle disease known as Texas fever, was held unconstitutional as a regulation of interstate commerce, apparently because the Court thought the restrictions upon such commerce were unreasonably severe,—severer than was necessary for accomplishing the purposes of the act. So the case of *Hall v. De Cuir*, 95 U. S. 485, appears to lend support to the view above stated. In that case the constitutionality of a State law requiring all common carriers, while carrying passengers within the limits of the State, to furnish the same accommodations to white and colored passengers, was held unconstitutional as a regulation of interstate and foreign commerce. The decision is not based upon any general reasoning. One reason that was urged by the Court against the validity of the law was the inconvenience which such laws might cause to carriers doing an interstate business. For if one State might require the same accommodations to be furnished to whites and blacks, an adjoining State might require that separate accommodations be furnished them, so that a carrier might be required to change his accommodations for passengers every time he crossed a State line. All that a State could reasonably do to protect the rights of black passengers was to require that equally good accommodation be furnished to whites and blacks. A precisely similar line of reasoning was employed in the case of the *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*, 118 U. S. 557, where a State long-and-short-haul law was held unconstitutional as a regulation of interstate commerce, in as far as it applied to transportation within the State, which was a part of interstate transportation, on the ground that it was a regulation of interstate commerce.

This argument from inconvenience would have no validity upon the theory that an intention to regulate foreign or interstate commerce is necessary to constitute a law a regulation of such commerce. It can avail only upon the theory that a law not

passed with the intention of regulating foreign or interstate commerce may nevertheless be a regulation of such commerce, if it operates to impose restrictions upon foreign or interstate commerce which, in the opinion of the Court, are unreasonable. Still, it is by no means certain that these cases can be regarded as establishing any such general principle. While the decision of the Court in *Railroad v. Huesen* appears to go upon the "unreasonableness" of the provisions of the law, there is language in the opinion which would seem to indicate that the Court thought that the law was passed for the purpose of discriminating against the cattle of other States. Thus the Court say: "The object and the effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States." In this view the decision would rest on the same principle as *Welton v. State of Missouri*, 91 U. S. 275. As to the cases of *Hull v. De Cuir*, 95 U. S. 485, and *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*, 118 U.S. 557, it is not clear that they cannot be explained consistently with the principle that an intention to regulate foreign or interstate commerce is necessary to constitute a law or regulation of such commerce. In those cases the laws in question were no doubt regulations of commerce. They purported to be regulations of domestic commerce only; but when we come to consider the nature of the regulations, we see that if applied to that part of interstate transportation taking place within the State, they must almost necessarily operate extraterritorially. The effect of the law of Louisiana requiring carriers engaged in carrying passengers within the limits of the State to furnish the same accommodations to black and white passengers, so far as it applied to carriers doing an interstate business, would almost necessarily be to compel them to furnish the same accommodations to them throughout the entire trip, for the carrier could not conveniently change the accommodations during the trip; and if Louisiana required the same accommodations to be furnished blacks and whites within the State, he would practically be compelled, in the absence of conflicting legislation in the other States, to furnish them the same accommodations throughout the entire trip. As this effect of the law is so obvious, is it not to be deemed that one of the purposes for which the law was enacted was to accomplish this effect? The case of *Wabash, St. Louis, & Pacific Railway Co. v. Illinois* is capable of a similar explanation. The

State long-and-short-haul law could not practically be applied to the part of interstate transportation taking place within the State without materially affecting the rate for the transportation taken as a whole, and this obvious effect of the law indicates a purpose on the part of the Legislature to regulate interstate rates.

Directly opposed to the theory that a State law is to be deemed a regulation of foreign or interstate commerce, without regard to its purpose or object, if it impose a burden or restriction upon such commerce which the Court deem unreasonable, are the bridge cases. It is well settled that a State may authorize the obstruction of a navigable stream or other body of water by dams or bridges in any manner it may see fit. In *Gilman v. Philadelphia*, 3 Wall. 713, the Court say: "It must not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power shall be exerted within the sphere of the commercial power which belongs to the nation." This doctrine that the States have absolute power to obstruct their navigable waters with such bridges or dams as in their judgment are required to meet the public need, and that this judgment is not reviewable by the Courts, however serious the obstruction of interstate or foreign navigation may be, is utterly opposed to the doctrine that a State law operating upon foreign or interstate commerce, but not intended to regulate it, will, nevertheless, be held unconstitutional, as regulation of such commerce, if, in the opinion of the Court, they impose unreasonable restrictions or burdens upon foreign or interstate commerce. If the latter doctrine is to be deemed established by the cases, then the bridge and dam cases must be regarded as an exception to the general rule.

The case known as the State Freight Tax Case seems to be largely responsible for the dicta and reasoning that appear favor-

able to the doctrine that a State law unnecessarily interfering with foreign or interstate commerce is unconstitutional, as a regulation of such commerce, regardless of the intention with which it was passed. That case involved the validity of a State law imposing a tax upon common carriers for every ton of freight carried by them within the limits of the State. It was held that the law was virtually a tax upon freight itself, and was, therefore, unconstitutional as to interstate freights. The decision of the Court goes entirely upon the operative effect of the law, and not at all upon the intention with which it was passed. Strong, J., who delivered the opinion, said: "How can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation? It is not the purpose of the law, but its effect, which we are now considering."

One of the reasons urged by the Court against the constitutionality of the law was, that if the constitutionality of State laws operating to impose a tax upon interstate freights was conceded, the States would virtually have it in their power to exclude such freights, since they could practically accomplish that result by making the tax so high as to prohibit the bringing of them within the State. This argument, which has also been employed in some subsequent cases, was deemed conclusive of the unconstitutionality of the law. It would seem, nevertheless, to be clearly fallacious. It proves too much. It would prohibit all State laws affecting foreign or interstate commerce. Thus it could be said that to admit the right of a State to impose quarantine restrictions upon foreign commerce would virtually empower the States to exclude foreign commerce by making the restrictions so severe as virtually to prohibit such commerce. In the case of the State Tax on Railway Gross Receipts, 15 Wall. 284, a case decided at the same time as the preceding case, a State law taxing common carriers according to their gross receipts was held constitutional, and yet, applying the reasoning of the preceding case, it would seem to be unconstitutional. The operative effect of the two laws would, probably, be nearly the same. The gross receipts of most roads are made up chiefly of earnings from the carrying of freight and passengers, and a tax on gross receipts would simply create an additional burden to be borne by the passenger and freight traffic. Of this additional burden, interstate freight and passenger traffic would have to bear its proportionate part. Then, why not argue that the right to impose such

a burden upon interstate traffic implied the power to prohibit such traffic.

The weakness in this argument is that it fails to recognize that the purpose of a law is to be considered and taken into account. Because a State may tax objects of interstate commerce for purposes of revenue, it by no means follows that it may tax them for the express purpose of excluding their admission into the State. The answer to the argument is contained in the following extract from the opinion of Swayne, J., in *Gilman v. Philadelphia*. Speaking of the power of the States to obstruct navigable streams by dams and bridges, he says: "Whenever it shall be exercised openly or covertly for a purpose in conflict with the Constitution or laws of the United States, it will be within the powers, and it will be the duty, of this Court to interpose with a vigor adequate to the correction of the evil;" or, in general terms, the power of the States to pass certain kinds of laws does not imply the power to pass them for an unconstitutional purpose. The notion that State laws "unreasonably" burdening foreign or interstate commerce are to be deemed unconstitutional as regulations of such commerce seems to have come as a modification of the extreme view of the law taken by the Court in the State Freight Tax Cases, and in the endeavor of the judges to avoid the logical consequences of that view. The position that any State law operating to impose a burden on foreign or interstate commerce was unconstitutional as a regulation of such commerce being untenable, in receding from that position the Courts passed to the position that only laws imposing unreasonable burdens upon foreign or interstate commerce were regulations of such commerce. This position, if not more defensible logically, is more satisfactory from a practical point of view.

We have now made a survey of all the more important cases and classes of cases decided in the Federal Supreme Court which bear upon the question of the respective powers of the State and Federal governments to enact laws operating upon foreign or interstate commerce. We have seen that the cases of *Gibbons v. Ogden* and *Willson v. Black Bird Creek Marsh Co.* state the principle that a sovereign power is to be regarded as a right to aim at a certain end, and not as the right to use certain means; that the United States in the exercise of the power to regulate foreign and interstate commerce, and a state in the exercise of some dis-

tinct reserved power, may pass laws similar or identical in their provisions, and that, therefore, the question whether a given State enactment is a regulation of commerce or not cannot, in doubtful cases, be answered without scrutinizing the purpose for which the Legislature passed it; that this principle was applied in the case of *Miln v. New York*, and recognized and developed by Woodbury, J., in his opinion in the *License and Passenger Cases*, he laying down the further principle, that in all the cases of doubt as to the purpose of a State law its constitutionality should be sustained; that, in the course of the controversy over the question of concurrency or exclusiveness of the commercial power of Congress, the principles laid down and the distinctions taken in the earlier cases were, to some extent, lost sight of, and were covered up and obscured by the dust and smoke of that controversy; that, in the case of *Cooley v. Board of Wardens*, that controversy was settled by what appears at first sight to be a compromise decision, to the effect that the commercial powers of Congress are in part exclusive and in part concurrent, which decision, however, on closer analysis, appears to be a practical victory for the cause of "exclusiveness," the part of the commercial power which is held concurrent being apparently intended to cover such laws, like quarantine laws, health laws, etc., which affect foreign or interstate commerce, but are passed with a different purpose from that of regulating such commerce, and which, consequently, are not to be deemed regulations of foreign or interstate commerce; that the more recent cases do not attempt to lay down general principles touching the means of distinguishing valid State laws affecting foreign or interstate commerce from State laws invalid as regulations of foreign or interstate commerce; that while the modern decisions amply recognize the principle that an intention to regulate foreign or interstate commerce is the criterion of a regulation of foreign or interstate commerce, to the extent of holding State laws, ostensibly framed for other purposes, unconstitutional, if really passed with the intent of regulating foreign or interstate commerce, there appears to be a tendency to abandon that criterion in the case of laws "unreasonably" burdening or impeding foreign or interstate commerce, though passed without intent to regulate such commerce, and to hold such laws invalid as regulations of foreign or interstate commerce, regardless of their object or purpose. We have seen that this tendency of

the law is opposed to the well-established principle of the bridge cases, and also to the principles laid down in the case of *Gibbons v. Ogden*.

Has this tendency become established law? The writer thinks that it has not. There has certainly been no deliberate repudiation in any of the cases of the doctrine of the case of *Gibbons v. Ogden*. On the contrary, that case has ever been regarded as the source and fountain-head of the law, and its utterances as almost above criticism. The dicta in the modern cases in conflict with the doctrine of *Gibbons v. Ogden* were, it would seem, the result of a failure to grasp and understand that doctrine, and not of a deliberate intention to lay down principles in conflict with it. In the very cases where those dicta are uttered, the case of *Gibbons v. Ogden* is often cited with approval, and in none of them is there the least attempt at criticism of that case. Again, the bridge cases can only be explained by the theory that intention is the only criterion of a regulation of foreign or interstate commerce; and the cases holding State laws ostensibly passed for some proper purpose, but really intended to regulate foreign or interstate commerce, to be regulations of such commerce, also strongly support that theory.

When we examine the question on principle, the arguments in favor of the theory of "intention" as the true criterion of a regulation of foreign or interstate commerce strongly preponderates. The theory that State laws "unreasonably" affecting foreign or interstate commerce may be held unconstitutional, as regulations of such commerce, is objectionable, in making a court of law the arbiter of the reasonableness or unreasonableness of a measure passed by a State to accomplish an object or aim admitted to be proper and legal. Again, Congress can at any time control State legislation deemed unduly oppressive to foreign or interstate commerce by positive enactment by virtue of its commercial power.

In the opinion of the writer, according to the law as it stands to-day, the purpose or intention of the State Legislature in passing a law operating upon foreign or interstate commerce is the only criterion of whether it is or is not a regulation of foreign or interstate commerce, and the difficulties of the law would be greatly lessened if the Courts would clearly and in express terms adopt this criterion.

*Louis M. Greeley.*



## SUBSEQUENT PAYMENTS UNDER RESULTING TRUSTS.

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SINCE the text-books are not very full upon what are known as "subsequent payments" under resulting trusts, and since the Courts sometimes speak ambiguously about them, it is of use to notice certain cases whose value is increased by the fact that there are comparatively few of the kind. Subsequent payments usually fall under that class of resulting trusts in which the consideration is paid by one, and the land is granted to another. The peculiar rule is that the trust must result at the time of the grant; that it is implied by law from the acts of the parties; that the intention of the parties to create a trust is not defeated by their oral expression of it; and that payments and agreements before or after the grant cannot of themselves raise a resulting trust. When, for instance, payments subsequent to a grant are held to show such a trust they are merely parts of a transaction which as a whole is held to prove that at the time of the grant a trust was raised.

This distinction between proving the trust, and creating it, is often overlooked, and is important in the cases *where notes are given for the land by one party for the benefit of another, and the payments in money are made subsequently* by that other. The fact that a note is paid by one who is not a party to it tends to convince the Court that the nature of the transaction, at the time of the grant when the note was given, was as follows: First, the note was in fact lent by the maker to the person who now pays it, although it was not delivered to him; second, the note, being so lent to him, was, therefore, held in trust for him by the maker before it was delivered to the grantor for the land; third, the note so held in trust was delivered to the grantor for the land, which being so purchased was affected by the same trust that affected the note; fourth, thus the trust in the land was then raised in behalf of the person who now pays the note, whether the parties orally expressed or can be supposed to have thought of this legal analysis or not, and even if they used words inconsistent with this explanation of their conduct. But the Courts sometimes speak as if these payments raised the trust, when, strictly speaking, they are the conditions upon the performance of which the transaction as

a whole is completed, so that the Courts will enforce the trust which was raised by the notes loaned to serve as a consideration for the grant. Even if the payments had not been made the Courts might hold that a trust had resulted, although they might not enforce it unless the plaintiff should make the payments. In *Runnels v. Jackson*<sup>1</sup> no payment had been made, and a contract for payment from a certain crop had been broken by the complainant, although a subsequent tender of the money was made by him.

The length to which a Court will go in inferring that a trust results from acts which can mean nothing but a loan is illustrated by that case of *Runnels v. Jackson*,<sup>1</sup> in which the person who took the grant of the land expressly refused at the time to lend the money to the person for whose benefit he actually took the land and paid the money. Yet the Court held that there was a loan and that a trust resulted.

And the same tendency is peculiarly shown by *White v. Sheldon*,<sup>2</sup> where a trust was held to result in favor of an attorney who had rendered, was rendering, and continued to render services, before, at, and after the time of the grant of mining land to another who furnished the money for the purpose. Neither of these cases contains the element of notes, but in *Runnels v. Jackson* the person who was held to be a *cestui que trust* had not paid anything, and the decree in his favor required him to pay what was held to have been a loan when the trust resulted. In *White v. Sheldon* the Court speaks of the services of the plaintiff as a part of the consideration, and says, "Equity looks to the consideration, and creates a trust in favor of him who furnishes it, regardless of whether such consideration be money, or labor, or property given in exchange." But in view of the principle of resulting trusts that the land is affected by the same trusts, if any, which affected the money,<sup>3</sup> and since money was actually spent by the defendant in *White v. Sheldon* to complete the transaction, which was somewhat complicated, it seems to be clearer to regard the money as in part a loan to the *cestui que trust* in anticipation of the services by which he was to pay for it. Thus the services which followed the grant resemble the subsequent payment of a note by a *cestui que trust*. Then if the Court had said *enforces* instead of "creates," it would seem to be more correct in describing the effect of the

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<sup>1</sup> 1 How. (Miss.) 358 (1836).

<sup>2</sup> 4 Nev. 280 (1868).

<sup>3</sup> *Gibson v. Foote*, 40 Miss. 788 (1886).

services of the complainant in *White v. Sheldon*, for the trust results at the time of the grant. Strictly speaking, equity "creates" or raises the trust at the time of the grant, then the Court will enforce the trust so created or raised after the *cestui que trust* has made his payment. It is true that the transaction is treated as one; but this is not a reason for confusing the acts, the actual diversity of which is the very occasion for the exercise of the Court's authority. The value of treating the transaction as one does not fully appear without this analysis.

The cases concerning notes which have been alluded to are stated below. It is unnecessary here to take the distinction between the cases where notes are themselves payment, and where they are not, for in either event the views here suggested are applicable. Whether a note be strictly payment, or not, it may be loaned and may be given as the consideration of a grant.

In *Dudley v. Bachelder*<sup>1</sup> the Court overruled a demurrer to a bill alleging an agreement by which money *and notes* were advanced as a loan to the complainant in the purchase of property taken in the name of the lender but for his benefit, and put the correct rule as follows: "If, then, the purchase-money paid and the notes given for the lands conveyed to P were the money and notes of P, loaned to this complainant, he having at the time given his notes therefor, or having by some valid contract agreed to repay the money advanced and interest, and to take up the notes thus given at their maturity, and take a deed of the land, then there would arise a resulting trust in his favor. Whether the evidence will establish such a trust is a matter to be determined upon the hearing of the cause."

In *Cramer v. Hoose*<sup>2</sup> one paid a third of the purchase-money for land, and his father who attended to the matter for him gave his own notes for the balance. Afterwards the father paid his own notes so given, but the payments were made in pursuance of a contract with the son by which the son was entitled to have such payments made for his benefit. It was held that a trust resulted in favor of the son. Thus the notes were treated, like the original purchase-money in *Runnels v. Jackson*, as loans to the son, and the payments on the notes were equivalent to payments of the loans. The Court said, "Being paid in pursuance of such a contract, such payments have the same legal effect as if the money had been paid to (the son) by his father, and he had paid it to the holders of the notes."

<sup>1</sup> 53 Maine, 403 (1866).

<sup>2</sup> 93 Ill. 503 (1879).

In *Lounsbury v. Purdy*,<sup>1</sup> the plaintiff paid part of the purchase-money, and the defendant and another gave their note for the balance. The third party took the title in his own name. The agreement was that he should hold it in trust for the plaintiff, who afterwards paid the note. The Court discusses the facts, and treats the money and note as together the consideration which raised the trust in the whole land at the time of the purchase. Thus the note of the defendant and another is held to have been loaned to the plaintiff, and hence to have been held in trust before delivery for the plaintiff. Hence the resulting trust was sustained against creditors of the person who had taken the legal title.

And in this case the Court laid down the same reasonable rule as follows: "In this case there can be no doubt that whilst the grant was made to one person, the consideration therefor was paid by another. The defendant objects that but a part of the purchase-money was paid when the deed was executed, and that if there could have been a resulting trust in favor of the plaintiff it would have been only *pro tanto*. But a note was given for the residue at the same time, in her behalf, by her then friends, and it is apparent that it was the understanding at the time when the conveyance was made. It is not necessary that the consideration should be paid in specie, but anything representing it, coming from or in behalf of the *cestui que trust*, will be equally available to protect the beneficial interest. The cases which declare the unavailability of subsequent payments have reference to such as are made pursuant to arrangements concocted after the conveyance had been made and consummated.

In *Barrows v. Bohan*,<sup>2</sup> a woman made a parol contract for the purchase of land, and at different times paid parts of the purchase-money. Her brother then agreed to go halves with her in payments and ownership. Accordingly he made certain payments and gave his note for a balance of the purchase-money. The land was conveyed to him. Afterwards he and his sister paid his note. They also built upon the land, each furnishing money. It was held that a trust resulted in her favor for half. The Court took as the test facts the payments by the sister, and her actual liability for a part of what was paid by her brother. One of these facts consisted in the intention of the parties as distinguished from their

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<sup>1</sup> 16 Barb. 376 (1853), and for the facts, 11 Barb. 490 (1851).

<sup>2</sup> 41 Conn. 278 (1874).

oral agreement, and since the Court found the intention of a trust as a fact, it held that the parol agreement for the trust did not defeat the trust which the law inferred from the facts. The whole transaction was treated as one in order to ascertain the fact of intention. This was finally determined by treating the brother's note as a loan to the sister for whose benefit it was given. For the Court says: "Whether she is entitled to one-half the property or not depends upon the view we take of the mortgage debt of \$265 (the amount of the note). If that is to be regarded solely as the debt of the respondent (brother), and the petitioner (sister) as not then responsible for any part of it, either to the respondent or the grantors, then she had no title in respect to that portion of the purchase-money. But if it is to be regarded as her debt in part, she being either jointly liable, as between themselves, with the respondent, or liable to the respondent for one-half the amount, then her title to one-half of the property is complete."

In *Morey v. Herrick*,<sup>1</sup> two men agreed to go halves in payment and ownership, and one took the land in his own name. For the land was given a note, signed by one of them, and by a third party, who signed with him at their request. The one whose name did not appear paid his half on the note. Although a question of notice affected the title the Court (at the request of the parties and with reference to possible future litigation in the matter) expressed its opinion that a trust had resulted in his favor, and said: "What difference can it make that eventual payment was secured by a promissory note, made, in part, at least, on (his) credit and at his request? None whatever. It cannot be doubted that he was bound to the surety he procured, to discharge it when due, and it is proved that he did so. He is, therefore, to be regarded as though he had been actually a party to the note, and the subsequent payment of at least a moiety of it is reflected back to the inception of the purchase."

This seems to be an unnecessary reason,—to say that the payment of money is "reflected back;" for it is simpler to regard the giving of a note under such circumstances as a loan of the note to the person who does not sign it, but for whose benefit it is given. Then the payment being held to be a part of one whole transaction we get rid of a vague word, and have a clearer view of the act of creating and the occasion for enforcing the trust. This is

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<sup>1</sup> 18 Pa. St. 123 (1851).

the express doctrine of *Dudley v. Bachelder*, and the meaning of *Lounsbury v. Purdy*, and *Barrows v. Bohan*, and *Cramer v. Hoose*. But even in *Dudley v. Bachelder* the Court used the following words: "The payment which *raises* a resulting trust must be part of the transaction, and *relate* to the time when the purchase was made" (p. 407). (The italics are mine.) Since the transaction is held to be one, the word "raises," as applied to the effect of the payment, does not imply that the trust was not raised by the loan of the notes, but rather has in view the enforcing of the trust, as I have above suggested concerning *White v. Sheldon*. The word "relate," in *Dudley v. Bachelder*, simply indicates the unity of the transaction, which in fact consisted of both the loan and the payment of the loan. The trust cannot be said not to have existed between the loan and the payment of the loan, for, although the transaction is held to be one, time in fact intervened, and within such time the land was, as in *Runnels v. Jackson*, subject to the equity which was completed, for the purpose of being enforced, by the act of payment.

Practically also it is important to insist upon the distinction between the creation of the trust by the loan of a note, and the evidence or want of evidence of the trust, consisting in the payment of the note; for when the note has not been paid, the maker of it, if fraudulently inclined, sometimes takes advantage of that to deny that any trust exists. This he may do, either for his own benefit as against the person for whose benefit he originally agreed to act, or to protect that person against creditors by denying their debtor's interest in the property in question. Sometimes a shrewd speculator, who induces a tool of no pecuniary responsibility to sign notes for him, and to take the title of land for him, by promising to take care of the whole matter, so covers his tracks that the poverty of the pretended owner, which makes it impossible for him to be the real purchaser, is the chief evidence of the trust,<sup>1</sup> and the construction that the notes were themselves a loan to the person for whose benefit they were, in fact, given, is the chief point by which the raising of the trust can be established. Hence appears the practical importance of the cases cited.

*Charles E. Grinnell.*

BOSTON, September, 1884.

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<sup>1</sup> *Willis v. Willis*, 2 Atk. 71 (1740), a leading case.

CHANDELOR *v.* LOPUS.

MR. BIGELOW, in the preface to his "Law of Fraud," says : "What shall be said of a treatise on the law of fraud which makes no mention of Chandelor *v.* Lopus? . . . The truth is, Chandelor *v.* Lopus — and this case is taken as an illustration of a class that has had its day — was one of the few decisions upon an important point." The case, he says, was *imperfectly reported*.

It is certainly surprising how frequently in the United States this case has been misunderstood, and that by men in the highest position it has been assumed to decide a point that was not in the case, and could by no possibility have been there decided. On the one side, the supposed decision which absolutely shocks all sense of common honesty has been accepted, gloried in, and adhered to. On the other, the grossness of the fraud involved in and sanctioned by the supposed decision caused its rejection, and by a true judicial instinct the annunciation of a rule which really is the true one on the subject to which the case belongs, if not implicitly contained in the case. The same misfortune has occurred with another case, — Pordage *v.* Cole. There, even English judges have been misled, — a thing perhaps impossible but for the fading away of the knowledge of the art of pleading, which was the only thing involved in either case, — and, until Lord Bramwell pointed it out, nobody seems to have noticed or ventured to assert that this was all that was decided ; while with many — not all — both these cases have been persistently treated as deciding great questions on the law of contract, and fraud connected with contract, when, in fact, a point of pleading only was decided ; and one of those was wrong, as every form-book proves.

Singularly enough both cases are admirable texts for dissertations on the most important practical questions of every-day commercial life, while neither decided anything that can really be called important, and one of them, as I have said, was certainly wrong.

It so happens that both cases were decided on identical similar points : one on demurrer ; the other in error on a motion in arrest of judgment, — which raises the same points as a general demurrer, that is, objections that are substantial and not merely

formal. Stephen's, 96. *Chandelor v. Lopus* was on a motion in arrest of judgment. To this I confine myself. No one concerned in the decision ever knew, therefore, what were the facts, or the merits, or the evidence. There was but this single point: *Does this averment show a cause of action?*

As happened in the commentaries on *Pordage v. Cole*, this has been generally overlooked, and it has been supposed by some, who ought to have known better, that the case had decided that, without the use of a cabalistic word, or some special form of words, a contract could not have been made.

In *Chandelor v. Lopus* all that was decided was this: that the legal effect of an alleged contract or conduct must be stated, and not evidence from which that effect can be inferred, or by which it may be proved. And this, though the fact, if used as evidence, may be such that the inference is inevitable that a cause of action is proved. How, then, can it have been that men of the capacity and in the position of Chief-Justice Gibson of Pennsylvania, in *Borrekens v. Bevan*, 3 Rawle, 44, and Chief-Justice Parker of Massachusetts, in 13 Mass. 143, made such absurd mistakes?

It is impossible to assign any other reason than that both were not familiar with the despised art of the pleader.

The divergence of the deductions from the same premises is most characteristic.

Now, what is it that both these eminent men thought was decided, and which one accepted and gloried in, and the other rejected, refusing to be bound by any such law? A jeweller dealing with his customer exhibited a stone and *affirmed* it to be a bezoar stone. The purchaser bought it for £100, and it was not a bezoar stone. There is no liability in that case, says one. There is, says the other. Observe. There is no fraud or intentional false statement. But there was a statement of a fact connected with a thing being sold; it was a fact peculiarly within the province of the seller and unknown to the buyer, and which he had a right to suppose the seller knew. It was of an occult quality of a substance, constituting the very essence of the substance.

The purchaser evidently relied on the statement, and presumably was known to have relied on it. All this is implicitly contained in the averment as matter of evidence or proof.

What makes C. J. Gibson's mistake the more remarkable is that



his attention had been drawn to the true point. He says, parenthetically, that no particular form of words is necessary to create a contract, even the contract of warranty, and that it is for the jury to say what is the effect and meaning of verbal statements, conversations, or negotiations; and yet he denies that such conversations under such circumstances between such persons afford any evidence to justify the inference that the jeweller undertook or agreed, or contracted or promised, in consideration of the purchase of the stone and payment of the price, that the stone bought was really what he described it to be: that is, that the chattel was what he had said it was. Parker, C. J., simply refused to accept any such sanction to swindling as the law of his State.

The point decided in *Chandelor v. Lopus* no doubt has been confused with the remarks or reasons attributed by the reporter to the judges who gave judgment. Whether they ever uttered them is more or less uncertain. Rarely do two reports of the same case agree in the reasons, or, as we call them, the opinions of the judges. Sometimes one reporter finds a point decided which is omitted by another. Sometimes a fact stated by one explains a decision stated by another. Here, as has been said, the question arose in error and on a judgment on demurrer, and the only possible point was, Did the allegation show a cause of action? It certainly did not. On the other hand, it showed evidence which certainly was sufficient to prove a cause of action. The test of the inefficiency of that averment is, that had issue been joined the plaintiff would be entitled to a verdict if he proved the facts averred. And it would not have availed had it been proved that the averment was qualified by there having been an express request and refusal to warrant, by an admission that the purchaser was not deceived, but took his chance, or that he did not rely on the averment, but believed it was untrue when he heard it, or that the thing turned out to be a diamond worth £1,000, instead of being a bezoar stone worth £100.

Put the case in legal form in either of the two possible aspects it could assume to create a liability, and all these things become material. Was there deceit? — *i.e.*, successful fraud and damage resulting, — or was there a contract, in which case fraud or knowledge or deception become immaterial?

My object is to redeem the famous case from being relegated to the rubbish of the past, and show it up as a specimen of as per-

fect law as can be produced at this day ; and which, as a point of law, must last as long as a claim or a defence must be stated. For it really decides two things. One is a rule of pleading, which in modern times is thus stated, — that things must be stated according to their legal effect. Evidence cannot be stated either in declaration or plea, because the issue would be confined to the existence of that evidence, and its effect would be an immaterial matter. The other point decided is that a mere statement, unless it was made as a contract or was made fraudulently, is immaterial, and if either of these is relied on they must be pleaded accordingly. The unhappy result of the misapprehension, that because an untrue statement of a fact did not, without more, necessarily show a state of facts on which liability was a necessary consequence, therefore it could not be evidence to establish a liability, is exhibited in *Boyd v. Wilson*, 3 Weekly Notes of Cases, 521, where it was decided that a sale by sample does not create a contractual liability if the bulk is not similar to the sample. Nothing can be a more logical deduction ; but the absurdity of the result should have induced a suspicion that the fallacy lay in the premises. If statements of facts, even such as they were in *Chandelor v. Lopus*, and between parties holding the relative positions as in that case, are not evidence to authorize an inference of an intent to warrant, how can acts or conduct be so? And what do I add to my statement as to quality by producing a sample? There is no reason to suspect intentional deceit in either case. That a statement is untrue goes but a little way to prove lying. For one fact we know there are a million we assume we know, and yet know nothing in that sense that makes an untrue statement a lie. The merchant that shows a sample relies on a drawer of the sample, and he on a deputy, and he on the laborer that brings out the lot from which it is to be drawn.

The liability to make the statement good, if it is not true, is sufficient, for all practical purposes, to insure efforts to make it true. Under the Pennsylvania rule commerce could not exist. Probably no one engaged in commerce, properly so called, would dare invoke the rule. He would be driven from the haunts of men, — at least expelled from the Commercial Exchange.

In justice to the bar of the State it ought to be stated that this distinction between the language of pleading and that of evidence, and that this assumption in *Borreken v. Bevan* was without foun-

dation and contrary to authority, was distinctly and admirably brought to the notice of the Court in *Fraley v. Bispham*, 10 Barr, 323, but with no other effect than to fasten the erroneous rule more firmly on our jurisprudence.

On two occasions the Legislature have been applied to for relief, and to put us on the level of civilized nations; but we could get no attention, — such subjects seemed to be beneath or above the statesmen who rule us.<sup>1</sup>

*R. C. McMurtrie.*

PHILADELPHIA, PA.

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<sup>1</sup> At the last session the Legislature enacted that a sale by *sample* should create an implied warranty of correspondence of sample and bulk.

# HARVARD LAW REVIEW.

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THE series of articles by Professor Langdell on the subject of Equity Jurisdiction will be concluded in the March number.

A CHANGE has been made in the course on Equity Jurisdiction. It has been the custom to take up Contracts and Torts in alternate years, and, according to this arrangement, the subject for this year would naturally have been Torts. On account of some misunderstanding, however, on the part of the class, Professor Langdell has consented to take up Contracts. Next year Torts will be considered.

A CASE<sup>1</sup> has recently been decided in the Supreme Court of Errors, of the State of Connecticut, which derives special interest from the fact that it is the only one in which the point involved has been squarely decided. Plaintiff and defendant were in 1802 adjoining owners in land which in the year 1700 had formed part of one of two channels, in which the Connecticut flowed at that time. By another change in the bed of the river the adjoining portions of their lands became again submerged, after which the river gradually receded from plaintiff's land until it passed the original boundary. The Court *held*, that by the submersion the original lines ceased to exist, and plaintiff became a riparian owner, and that the river having once become the boundary line would always remain so, notwithstanding the original line became subsequently exposed by still another change in the bed of the river. "If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movements in the other direction, gradually restoring what it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now approximate, lot. Having become riparian it has all riparian rights."

This view was held by Professor Gray, of the School, before the point had been directly adjudicated.

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<sup>1</sup> Welles v. Bailey, 10 Atlantic Rep. 565 (5 Oct. 1887.)

PHOTOGRAPHY is beginning to play an important part in determining what actually occurred at the time when the question in dispute arose. Thus, much testimony which is often open to the objection of being inaccurate is dispensed with, and much trouble and expense are saved from the fact that the jury need not visit the scene of the *res gesta*. At the recent railroad accident at Hexthorpe photography formed an important element in the examination. Before a piece of timber of the wreck could be removed, every feature of it had been accurately taken by means of a camera. The French officers and their friends who were shot at by the Germans the other day, upon the ground that they were mistaken for poachers, have been photographed in the dress they wore on the day of the event, to show that no such mistake could have occurred. It is even said that the National League in Ireland intends to call in the aid of instantaneous photography to protect itself against the misrepresentations of the Government. It has been suggested that there should be at every proclaimed meeting a skilful operator with a snap camera, who could follow every incident of the meeting and determine who were the instigators of the disturbances. We venture to predict that, though this latter plan would doubtless prove unsuccessful, there are numerous cases in which photography will be resorted to in the future where to day witnesses are called in to testify.

SIR HENRY JAMES writes an interesting letter to the London "Times" on an alleged violation of the Corrupt Practices Act<sup>1</sup> of 1883. This act provided, among other things, that "any person who corruptly, by himself or by any other person, either before, during, or after an election, directly or indirectly, gives or provides or pays, wholly or in part, the expense of giving or providing any meat, drink, entertainment, or provision to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election shall be guilty of treating." The facts of the case were these: The promoters of a political meeting had issued invitations to a free lunch, and had provided railway passes for those who attended the meeting. It does not appear that this meeting was held to support the election of any particular person, but a resolution was adopted, at the end of the meeting, pledging those present in general terms to support the Liberal cause. Sir Henry James says: "No one can doubt that this providing of food and drink free of cost at a political meeting and payment of money for railway expenses are a gross violation of the spirit of the Corrupt Practices Act. . . . It is comparatively immaterial at what stage of the political contest such practices and influences are exercised. The corruption which causes a man to profess a political faith is as injurious as that which induces him to fulfil it by recording his vote."

On the subject of primogeniture in England the following extract from a recent number of the New York "Daily Law Register" is interesting:—

"The common-law rule still exists, but a bill abolishing it by making

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<sup>1</sup> L. R. 19 Stat. 242; 46 & 47 Vict. c. 51.

the devolution of real property in case of intestacy conform to that of personal property, thus distributing the realty among the children, share and share alike, passed the House of Lords at its last session.

"The main object of this bill was to establish compulsory registration of title; and the clause abolishing primogeniture was incidental to this main object. The bill was introduced in the House of Lords by the Lord Chancellor on the 1st of April. It proposed, — 1, in respect to existing estates tail, that wherever a person of full age had power, without consent of any one else, to enlarge his estate tail by deed duly enrolled, then the Court shall do it for him; 2, that estates tail should not be created in future; and, 3, that the statute known as Westminster 2d be repealed. And it made the devolution of real to be the same as personal property. The bill passed the second reading, April, 1887. On July 7 it passed by a majority of 11.

"It failed to pass in the House of Commons, consideration being prevented by the engrossing subjects connected with the state of Ireland. The general expectation in England, however, is that it will be reintroduced and finally adopted, and that it is not likely that any amendments which may be made will impair the proposed abolition of primogeniture."

The leading speakers in favor of primogeniture were the Earl of Feversham and Lord Abinger. The Marquis of Salisbury said that he would be exceedingly sorry to see the practice of devolving the land on the eldest son discontinued. He believed that the importance of the clause, abolishing primogeniture, was enormously exaggerated, and that it would not in practice alter the devolution of land, because owners could in the future do by will what the law of primogeniture now did. On the division the vote stood 66 to 55 against an amendment, introduced by the Earl of Feversham, to strike out the clause relating to primogeniture.

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ON this subject of entail the position of Mr. Gladstone is significant. In a speech, delivered Oct. 19, at the recent Congress of the English Liberal Federation, one of the largest meetings ever held by the Federation, Mr. Gladstone declared himself squarely in favor of abolishing the system of landed entail. In his plan for reducing the accumulated legislative arrears he gave this question of entail as the second of the great questions which he considered, after the disposal of the Irish difficulty, "to stand in the first rank of legislative urgency, and to demand the chief and principal application of the mind of the country." His language was as follows: "I think no Liberal will, for a moment, doubt that the time has come when we ought to sweep away, I may say, to sweep away bodily, what we now understand by the system of landed entail. We want to have free trade in land. Bills of transfer have been proposed with respect to which the best legal authorities have taught us that, whether their intention be good or bad, they never could attain their purpose until entail is swept away; and that freedom of trade in land is to be recommended upon economical, upon moral, and upon social grounds, and because we have begun to recognize the extraordinary—I would almost say—necessity of our affording to our people at large a freer access to the uses of the land."

## THE LAW SCHOOL.

## CLUB COURTS.

## SUPERIOR COURT OF THE THAYER CLUB.

*Conveyance by Warranty Deed.*

A, who had no title to certain premises at the time, gave a warranty deed of them to the defendant, and the deed was recorded. A, later, bought the premises and conveyed them to the plaintiff. The defendant had taken possession of the premises. The plaintiff now brings ejectment.

The argument of the defendant is that the purchase by A enured to the defendant's benefit so that the subsequent conveyance by A to the plaintiff passed no title. At common law a conveyance of land, by one who at the time had no title to the land so conveyed, operated by estoppel, so that, if he subsequently got the title to the land, it would *eo instanti* by operation of law enure to the benefit of the grantee. The defendant contends that this principle of the common law has been extended in this country to conveyances by deeds of full warranty.

There are decisions in support of this position, but the Court which has most earnestly supported it, intimated in its last decision on the question that the principle of estoppel, as applied to warranty deeds, was not desirable, and, though firmly established in the State law, should be remedied by statute (see *Knight v. Thayer*<sup>1</sup>). Some States have distinctly repudiated the doctrine,<sup>2</sup> and certainly there is nothing to recommend it to the favor of this Court.

It is a mere theory, and, when coupled with our registry system, its practical results are bad; thus in the case at bar, though the deed by A to the defendant was recorded, it stood on the books of the company an isolated deed, which would not come to the notice of the plaintiff when he subsequently examined the records. A's record title to the premises was good when he conveyed to the plaintiff, and, if any reliance is to be placed on the registry system, plaintiff must be protected. This is no undue hardship to the defendant, since he might easily have found by examining the records that A had no title whatever to the premises he assumed to convey. The defendant has bought blindly, and must resort for his remedy to an action on the warranty.

## LECTURE NOTES.

**VOLUNTARY TRUSTS.**—(*From Professor Ames' Lectures.*)—The basis of a trust is a contract, and most trusts are contracts binding the trustee in favor of a third person, the beneficiary, who can enforce the contract in equity. As an original question it would seem that voluntary trusts should not be enforceable, as they lack the element

<sup>1</sup> 125 Mass. 25.

<sup>2</sup> *Calder v. Chapman*, 52 Pa. St. 359; *Way v. Arnold*, 18 Ga. 181.

of consideration, which is essential to a contract, but they must now be recognized as an established anomaly.<sup>1</sup>

To charge a person with a voluntary trust, it must be shown that he has declared himself trustee of specific property in favor of the alleged *cestui que trust*. The property must be specific, for one of the essential elements of a trust is a *res*, to which the trust can attach. If the property is realty, the declaration of trust must be proved by a writing signed by the trustee; but, if the property is personalty, the declaration or admission may be proved by any evidence. As a declaration of trust is an expression of intention, a person cannot be charged as trustee if it appears that he did not intend to make himself trustee. It follows that an imperfect gift should not be construed as a declaration of trust.<sup>2</sup> Thus, a father, desiring to make his daughter a present, bought \$2,000 worth of bonds, but, at her request, kept them himself, and remitted the interest to her. On his death it was held that she could not recover from the administrators, for the gift was not complete without a delivery of the bonds, and the Court could not make a trust out of an imperfect gift.<sup>3</sup>

The apparent meaning of a declaration or admission may be rebutted. Thus, if A, as "trustee for B," deposits money in a bank, and there is nothing to disprove the apparent intention, there is an irrevocable trust; and the trust is not the less effectually created if A retains the pass-book, and gives no notice to B.<sup>4</sup> But, if it appears that the deposit was not intended for B's benefit, the presumption of a trust is rebutted.<sup>5</sup>

On the same principle, what appears to have been a gift may be shown not to have been so intended. Thus, a deposit in a bank by A, in the name of B, is a complete gift to B, if so intended by A, and B may charge the bank for money had and received.<sup>6</sup> But, if a contrary intention is shown, B will hold as trustee for A.<sup>7</sup>

The same principle applies to policies of life insurance taken out by A in B's name,<sup>8</sup> or to stock entered by A in B's name on the books of the company.<sup>9</sup> Thus, in *Standing v. Bowring*,<sup>10</sup> it appeared that the plaintiff bought stock and entered it on the company's books in the name of the defendant, her godson, intending it as a gift; but she did not notify him. She afterwards married, and then requested him to transfer the stock to her. This he refused to do, and the Court held that the gift must be sustained, since the presumption of a gift had not been rebutted.

<sup>1</sup> *Ex parte Pye*, Dubost, 18 Ves. 140 (Ames' Cas. on Trusts, 20); *Price v. Price*, 14 Beav. 598 (Ames' Cas. on Trusts, 64).

<sup>2</sup> *Milroy v. Lord*, 4 De G., F. & J. 264 (Ames' Cas. on Trusts, 70); *Richards v. Delbridge*, Law Rep. 18 Eq. 11 (Ames' Cas. on Trusts, 100).

<sup>3</sup> *Flanders v. Blandey*, 24 Rep. 311 (Ohio).

<sup>4</sup> *Ray v. Simmons*, 11 R.I. 266 (Ames' Cas. on Trusts, 113); *Minor v. Rogers*, 40 Conn. 512; *Anderson v. Thompson*, 38 Hun. 394; *Witzel v. Chapin*, 3 Bradf. 386; *Smith v. Lee*, 2 Th. & C. 591; *Willis v. Smyth*, 91 N.Y. 297; *Mabie v. Bailey*, 95 N.Y. 206; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; *Nutt v. Morse*, 142 Mass. 1.

<sup>5</sup> *Barker v. Frye*, 75 Me. 29; *Bartlett v. Remington*, 59 N. H. 364; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Nutt v. Morse*, 142 Mass. 1.

<sup>6</sup> *Stapleton v. Stapleton*, 14 Sim. 186; *Mews v. Mews*, 15 Beav. 529; *Gardner v. Merritt*, 32 Md. 78; *Curran v. Jago*, 1 Collyer, 261; *Blasdel v. Locke*, 52 N.H. 238; *People v. State Bank of Fort Edward*, 36 Hun. 607.

<sup>7</sup> *Broderick v. Waltham Bank*, 109 Mass. 149; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163; *Robinson v. Ring*, 72 Me. 140; *Northrop v. Hale*, 72 Me. 275; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 308; *Lodge v. Pughe*, 8 Ch. Ap. 88.

<sup>8</sup> *Leimon v. Phoenix Co.*, 38 Conn. 204; *Re Richardson*, 47 L. T. Rep. 514; *Glanz v. Gloeckier*, 104 Ill. 573; *Scott v. Dickson*, 108 Pa. 6.

<sup>9</sup> *Adams v. Brackett*, 5 Met. 280; *Lucas v. Lucas*, 1 Atk. 270; *Jackson v. Twenty-third St. R.R. Co.*, 88 N.Y. 520; *Standing v. Bowring*, 31 Ch. D. 282.

<sup>10</sup> 31 Ch. D. 282.



RIGHTS OF LANDLORD AGAINST TENANT WHEN PART OF THE DEMISED PROPERTY HAS, WITHOUT FRAUD, BEEN INCLUDED IN A PRIOR LEASE TO A THIRD PARTY.—(*From Prof. Gray's Lectures.*)—In *Neale v. Mackenzie* (1 M. & W. 747), the second lease was by parol, and expired before the first. The Court held that as to the part carried by the first lease, the second lease was utterly void; and, as the rent was reserved in respect of all the land professed to be demised, that the landlord was not entitled to distrain for the whole or any part of the rent.

In *Ecclesiastical Commissioners v. O'Connor* (9 Ir. Com. L. Rep. 242), the second lease was under seal, and extended beyond the time of the expiration of the first lease. It was held that the second lease operated as a demise of the reversion of the part covered by the first lease, with the rent incident thereto, and conveyed to the tenant the whole interest in respect of which the rent was reserved. The landlord was accordingly allowed to recover the entire rent.

The manifest injustice of refusing to the landlord any compensation for the occupation of his property when the portion from which the tenant was excluded was, perhaps, of little or no value, and the exclusion caused by a mere mistake as to boundaries, is only partially met by the decision in *Ecclesiastical Commissioners v. O'Connor*. The injustice is the same whether the second lease be written or oral, or for a longer or a shorter term than the first, or if the first conveyance is in fee. A more equitable rule is indicated by Nelson, C. J., in *Lawrence v. French* (25 Wend. 442), where, while he decides that the landlord may not distrain for any part of the rent, he suggests that he may obtain compensation for the use and occupation of his premises under a *quantum meruit*.

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## CORRESPONDENCE.

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### TWO RECENT "TRUST" CASES.

CINCINNATI, OHIO.

BEARING on some of the questions raised by Mr. F. J. Stimson, in his interesting article on "Trusts," in the October number of the REVIEW, permit me to call attention to two decisions of the Superior Court of Cincinnati, in general term. The first was the case of *Geo. Hafer* against the N.Y., L.E., & W. R.R. Co. et al., reported in 14 Weekly Law Bulletin, 68. The facts were as follows: Holders of a majority of the stock of the Cincinnati, Hamilton, & Dayton Railroad Company, through three of their number whom they appointed their trustees for the purpose, made a contract with the New York, Lake Erie, & Western Railroad Company and Hugh J. Jewett, its president, by which it was agreed that their stock should be registered on the books of the company in the name of Jewett; that Jewett should, from time to time, deliver to the appointee of the board of directors of the N.Y., L.E., & W. R.R. Co. an irrevocable proxy to vote these shares at the election of directors of the C., H., & D. R.R. Co.; the certificates, though registered in the name of Jewett, were to remain in the custody of the three trustees, who were to issue to the

owners of the stock respectively "pool certificates" equal in amount to the shares of stock owned by each, and finally, the N.Y., L.E., & W. R.R. Co. guaranteed the holders of the "pool certificates" (which certificates were freely bought and sold in the market) a perpetual semi-annual dividend of three per cent. This contract was made in 1882, and the parties carried out its provisions through the years 1882, 1883, and 1884. In May, 1885, the plaintiff, as owner of a large amount of stock not included in the "pool," filed his petition against Jewett, the two railroad companies, and the three trustees, alleging the agreement to be unlawful, and praying that Jewett be restrained from delivering to the appointee of the N.Y., L.E., & W. R.R. Co. the proxy to vote the shares at the ensuing or any subsequent election of directors of the C., H., & D. R.R. Co. There seems to have been an understanding between Jewett and plaintiff, for the latter did not ask that the former be himself restrained from voting these shares. The N.Y., L.E., & W. R.R. Co., however, filed a cross-petition, praying, first, that Jewett be restrained from refusing to deliver the proxy to its appointee; or, failing this, second, from giving a proxy to any one else, and from voting the stock himself. The Court granted the relief prayed for by plaintiff, and that secondly asked for by the N.Y., L.E., & W. R.R. Co. The Court based its action upon two grounds. The first is that it is settled law in Ohio that one corporation cannot be a stockholder in another corporation, and that one corporation cannot be permitted indirectly to acquire the control of another which it is forbidden directly to obtain by acquisition of the latter's stock. The second and more comprehensive ground is, that an agreement by stockholders of a corporation for a pecuniary consideration, to transfer the right to vote upon their stock, is against public policy, illegal, and void.<sup>1</sup>

The second case was that of *Griffith* against *Jewett et al.*, reported in 15 Weekly Law Bulletin, 419, and like the first related to the stock of the C., H., & D. R.R. Co. The alleged purpose of this second "trust" was beneficent; it was "in order that the stock of said company shall not be liable to be bought up for speculative control, and to secure safe and prudent management in the interest of the public, as well as the stockholders," and to prevent consolidation or lease of the road, etc., "without full knowledge and due consideration on the part of stockholders." The trust agreement, which is set out at full length in the report, in substance was as follows: The owners of a majority of the stock, in consideration of one dollar paid to each, agreed to sell their stock to the trustees, each vendor receiving in return a trust certificate for as many shares "of the beneficial interest in the capital stock" of the company as he had furnished shares of stock; the trustees were to collect the dividends on the stock, and distribute them ratably among the trust certificate holders; the trust was to continue for five years, and at the expiration of that time was to be determinable only by the consent of two-thirds of the holders of the trust certificates; the stockholders, parties to the trust, constituted the trustees, by power of attorney irrevocable during the existence of the trust, their proxies to vote the stock. The trust certificates, in terms, enured to the holder "and assigns." The plaintiff, together with certain cross-petitioners, averring ownership of a large amount of these trust certificates, made a tender of the certificates to the trustees, with the re-

<sup>1</sup> Cf. cases collected in Pollock, Contracts, 2d Am. ed. p. 286, note (h).

quest that the shares of stock represented by them be transferred on the books of the company to the holders of the certificates, and a refusal by the trustees, and that the trustees intended to vote the stock so represented contrary to the wishes of the holders of the certificates, prayed that the trustees be restrained from voting said stock, and compelled to transfer to them on the books of the company the shares represented by certificates held by them.

The Court granted an order restraining the trustees from voting the stock represented by the certificates held by the plaintiff and these cross-petitioners. Another cross-petitioner, owner of stock not included in the "trust," also asked an injunction restraining the trustees from voting any of the stock embraced in the trust, on the ground of the illegality of the trust agreement.—The Court held that he was not entitled to any relief; that the trust agreement was not unlawful, save in so far as it provided that the proxy given it should be irrevocable, and so long as a stockholder who had given a power of attorney was content to let his proxy vote for him, no one else could complain. This conclusion is believed to be correct, though at first blush it may seem to be inconsistent with the decision in *Hafer's* case; it follows necessarily from the admitted lawfulness of proxies. If it be claimed that every stockholder has the right to the exercise of the personal judgment and opinion of every other in the voting at an election, the claim goes to the extent of denying the right to give a proxy at all for such purpose. The failure to annul the proxy is a continuous renewal of it, and approval of what may be done under it. It must be taken to be true that the constituent, so long as he does not object, confirms the acts of his attorney. The unlawful feature of the trust in the *Griffith* case was the provision that the power of attorney should be irrevocable; that, although the constituent might desire action of one kind, he was bound to suffer his proxy to take action perhaps of the very opposite kind. The decision is to the effect that though a stockholder may appoint an agent to vote his stock he cannot effectually bind himself not to revoke the agency; but so long as he is satisfied to have it continue no one else can complain. The *Hafer* case, while not denying this, decides that where a stockholder creates such an agency in consideration of a pecuniary benefit enuring to himself, in which the other stockholders do not share, thus creating in himself an interest hostile to theirs, the other stockholders may justly complain. In the *Hafer* case there was a clear agreement of sale of the right to vote the stock in consideration of a guaranty of a dividend on the stock embraced in the agreement, giving the holders of such stock a pecuniary advantage not enjoyed by the other stockholders. In the *Griffith* case there was no provision for any benefit to the members of the "pool" which would enure to them to the exclusion of other stockholders; there was simply an agreement among the holders of the majority of the stock to have their stock voted *en bloc*, so as to retain control of the corporation by themselves, and this was held to be not unlawful; but it was denied all executory force, inasmuch as it was held that any party to it might at any time refuse to be any longer bound by it.

*Gustavus H. Wald.*

## RECENT CASES.

**ADULTERY, WHAT IS.**—A, having recovered a judgment of divorce from B, in good faith married C. The judgment was reversed on appeal. *Held*—That A had not committed adultery by her cohabitation with C, though that marriage was invalid, and children born of it would be illegitimate. The decree of divorce was in effect “an invitation extended by the law itself” to a new marriage. Immoral intent is of the essence of the crime. *Bailey v. Bailey*, 45 Hun, 283, 36 Alb. L. R. 264.

**AGENCY—RATIFICATION.**—The agent of A, an insurance company, wrote a policy for B, B giving his note for the premium. It was also agreed between them that if the policy, on being sent to B, did not suit him it could be returned and the note would be given back. The policy was not satisfactory, and was returned, but A claimed to recover on the note because the agent exceeded his authority in making the agreement to return it. *Held*—the agreement was part of the contract, and if that was void, the whole was void. The company could not ratify a part and repudiate the remainder. *Jacoway v. Germ. Ins. Co.*, 5 S. W. Rep. 339 (Ark.).

**CONSTITUTIONAL LAW—POLICE POWER.**—The Board of Health of the city of Boston ordered that all rags imported should be disinfected. The defendant, under orders from the Board, disinfected some belonging to the plaintiffs, who refuse to pay the charges, and bring suit for the rags. *Held*—The provision is constitutional as being within the police power of the State. “There can be no doubt of the right of the legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual whose liberty to keep or do them is restrained.” *Train v. Boston Disinfecting Co.*, 11 N. E. Rep. 929 (Mass.).

**CORPORATION—LIABILITY FOR CONSPIRACY.**—“If actions can be maintained against corporations for malicious prosecution, libel, assault and battery, and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy.” *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 12 N. E. Rep. 825 (N.Y.).

The editor's note cites numerous cases to show that the doctrine that corporations are not liable in tort is exploded. To the same effect, *D. & R. G. R. Co. v. Harris*, Wash. Law Rep. 609.

**EVIDENCE—COMPARISON OF HANDWRITING.**—A depositor sues a bank for his balance. They claim to hold vouchers for it, but plaintiff says they are not genuine. The defendant's cashier testifies that the signature is the plaintiff's, and on cross-examination is asked if two specimens of handwriting submitted to him, and not in any way connected with the case, are also in the plaintiff's hand. He says they are. A witness for the plaintiff is allowed to testify that he wrote them during the trial. *Held*—Error. Extrinsic papers are not admissible into the case, on the ground that it would lead to an indefinite number of collateral issues. *Rose v. First National Bank*, 23 Rep. 694 (Mo.).

**EVIDENCE, REAL.**—A physician, in order to show the jury that a woman was paralyzed on one side, thrust a pin into her flesh in several places. Neither the physician nor the woman had been sworn. This was alleged as error, because they might wholly deceive Court and jury, without being liable for perjury. But the Court thought that the oath to tell the truth did not fit the case, and knew of no other oath to administer to witnesses save that to interpret correctly, which is equally unsuitable. And it is unquestionable that in civil cases one may exhibit his injuries to the jury. *Osborne v. City of Detroit*, 32 Fed. Rep. 36.

**INFANT—WHAT ARE NECESSARIES.**—*Ryder v. Wombwell*, L. R. 4 Ex. 32, which did not allow it to be shown that goods were not necessities, because the infant was already supplied, is no longer law in England. It was not followed in *Barnes v. Tave*, 13 Q.B.D. 410, and has been expressly dissented from by the High Court of Justice, Lord Esher, M. R., stating in terms that he would hold it wrong if the point ever came before him sitting in a Court of Appeal.—*Johnstone v. Marks*, 35 W. R. 806.

**MORTGAGE — FORECLOSURE.** — A mortgage on real estate in Illinois, given to secure the payment of two negotiable notes, contained a covenant that on default of interest both notes should become due at once. The United States Circuit Court allowed a *bona fide* purchaser of the notes and mortgage before maturity to foreclose, on default of interest, for the entire sum, without reference to equities against the mortgagee. In this they follow the rule of the United States Supreme Court at the same time noticing the fact that the Illinois Supreme Court would allow any defence which would be good between the original parties. *Swett v. Stark*, 31 Fed. Rep. 858.

**NEGLIGENCE — BANK DIRECTORS.** — Bank directors are trustees for depositors as well as stockholders, and are liable to both for losses resulting from their neglect of duty. *Delano v. Case*, 24 Rep. 432 (Ill.).

It is difficult to consider the directors of a bank as trustees for the depositors. The depositors are simply creditors of the corporation; the directors are the agents of the corporation. This being so, the directors are liable only to the corporation for their breach of duty. But they may be liable to the depositors indirectly through the corporation in case of its bankruptcy. That is, the right of action vested in the corporation against its agents is an asset which can be reached by the depositors by a bill in equity to compel the corporation to reduce it to possession. And equity will go farther and join the directors in the suit, thus avoiding multiplicity of actions.

A remedy in tort is not ordinarily given in such cases, except in the absence of other remedy.

**PARTNERSHIP — LIABILITY IN JOINT ENTERPRISE.** — Four companies owning steamboats put the business of obtaining custom for their boats in the hands of a corporation called the Kountz Line. Each company conducted its own affairs, and received from its agents, the Kountz Line Corporation, all the earnings of its own boat. One of the boats, loaded with goods insured by the plaintiff, was lost through unseaworthiness. There was no evidence that the owner shipped the goods on the faith of an existing partnership. *Held* — The plaintiffs can recover from the other three companies of the Kountz Line on the ground that they held themselves out to the public as partners, and are liable as such. *Sun Ins. Co. v. Kountz Line*, 7 Sup. Ct. Rep. 1278. Reversing 10 Fed. Rep. 768.

**PARTNERSHIP — VOLUNTARY ASSOCIATIONS.** — Certain persons, among whom were the defendants, by voluntary contributions ranging from fifty cents to five dollars, formed the "Bridgeport Coöperative Association," an unincorporated society, for the purpose of providing meat to members and others at cost. On the failing of the concern, it was *Held* — That defendants were liable individually for the debts contracted by the concern. If the plaintiffs had sued the Association under its assumed name they could have had execution upon the Association property only. The defendants here could have interposed a plea in abatement, and compelled all the members to be joined; but, not having done so, they are liable. The question is determined by the law of agency. *Davison v. Holden*, 10 Atl. Rep. 515 (Conn.).

**PROMISSORY NOTES — ACCOMMODATION — ON DEMAND.** — The fact that a note is an accommodation note is a good defence against a holder for value, who acquired the note after it was due. A demand note is due after a reasonable time, and that is, in most cases, a question for the jury. *Bacon v. Harris*, 36 Alb. L. J. 282 (R. I.).

**PURCHASER FOR VALUE WITHOUT NOTICE.** — One who buys property subject to an unrecorded chattel-mortgage, and credits the purchase price upon a debt due from the vendor is not a *bona fide* purchaser for value, and is liable on a suit to foreclose. *Overstreet v. Manning*, 24 Rep. 445 (Tex.).

**RIGHT OF WAY.** — When land is divided into lots, and a plat is recorded, a conveyance of lots describing them by a reference to the plat carries to the grantee a right of way over the streets therein indicated, even when the fee in the streets remains in the grantor. *Chapin v. Brown*, 10 Atl. Rep. 639 (R. I.).

The opinion reviews the authorities, and a note collects cases on the dedication of streets to public use by recording such a plat.

**SALE BY SAMPLE — CAVEAT EMPTOR.** — Worsteds coatings were ordered of cloth manufacturers to equal in quality and weight samples previously furnished. By reason of the mode of manufacture the goods were unfit for their purpose, on account of "slipperiness" — a lack of cohesion between

warp and weft. They were equal to the sample, but, unknown to either party, the same defect existed in it. Damages were claimed because the goods were not merchantable, and the claim was allowed. Lord Herschell said: "I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not, by reason of the mode of manufacture, be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think, too, that, where the article does not comply with such a warranty, it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature." The Court held that this warranty was not excluded by the fact that the goods were sold by sample. *Drummond v. Vangen*, 12 App. Cas. 284.

TELEGRAPH COMPANY — ERROR IN MESSAGE. — The plaintiff sent a telegram to a purchaser at a distance reading, "Will sell 800 M. laths, delivered at your wharf, two ten net cash." The company, in sending the message, left out the word "ten." The purchaser immediately accepted the offer. Before the goods were sent the error was discovered, but the purchaser demanded performance, and the plaintiff sent the goods. He now sues for the "ten" on a thousand. *Held* — That he did what he was bound to do in sending the goods, since the contract was complete and binding. The error was the error of his agent, and he may recover from the defendant as such. *Ayer v. Western Union Tel. Co.*, 10 Atl. Rep. 495; 36 Alb. L. J. 311 (Me.). This seems in accord with the American authorities. English law is *contra*. *Henkel v. Pape*, L. R. 6 Ex. 7.

TRUST, SECRET — PAROL EVIDENCE. — A testator bequeathed £500 to A and B, "relying, but not by way of trust, on their applying the same sum for and toward the objects, privately communicated to them." The executors objected to paying over the bequest, on the ground that there was a secret trust which appeared to be illegal. The legatees contended that as the will said there was no trust, the Court could not inquire further. But it was held that evidence is admissible in such cases as to whether there was a promise on the part of the legatees. For otherwise money might be left for illegal purposes, or legatees might keep for themselves what they really received in trust. *Re Spencer's Will*, 83 L. T. 274.

WATER RIGHTS. — The defendant railroad built a dam across a stream, above the plaintiff's mill, for the purpose of supplying their trains with water. *Held* — That is not such a use of the stream as will entitle the defendants to diminish the flow of water to the plaintiff's injury. *Anderson v. Cincinnati Southern R'y Co.*, 24 Rep. 502 (Ky.).

WILLS — ILLEGITIMATE CHILDREN BORN AFTER THE MAKING OF THE WILL. — The case of *Occleston v. Fullalove*, 9 Ch. Ap. 147, which allowed an after-born child to take property under a devise by her father to his children by his deceased wife's sister, with whom he had gone through the ceremony of marriage, has just been followed in England. In *Occleston v. Fullalove* the controversy was in regard to a child that was *en ventre sa mère* at the date of the will, but not so described. Vice-Chancellor Wickens held it contrary to public policy to allow such provision for the fruit of future illicit cohabitation. James and Mellish, L. JJ., reversed the decree on appeal, Selborne, L. C., dissenting. The Lords Justices proceeded largely on the ground that a will does not take effect till the testator's death, and hence such a provision is not for illegitimate children to be begotten in the future. The case is followed as binding, but with apparent reluctance. *In re Hastie's Trusts*, 35 Ch. D. 728.

Considering the question as one of public policy, the ground of the decision seems a narrow one, and the difference of opinion among the judges will deprive the case of any great weight where it is not a precedent. In fact, Lord Stirling almost advises the parties against whom he decides to appeal; so it can scarcely be said to settle the law in England.

WITNESSES — EXCLUSION AT TRIAL. — The plaintiff called a person as witness who had been present during the whole trial, though the judge had ordered the witnesses out of the room. Neither the plaintiff nor the witness knew the latter was to be a witness till called. *Held* — That the witness is competent, and would be competent even if he had remained in the court-room after he was called, against the order of the judge. His conduct would be subject for observation only, and would not affect his competency. *State v. Thomas*, 13 N. E. Rep. 35 (Ind.).

## REVIEWS.

A TREATISE ON THE LAW OF BAILMENTS. By James Schouler. Boston: Little, Brown, & Co. One volume. 2d edition, 1887. 8vo. pp. 795.

The second edition of Mr. Schouler's book on Bailments and Carriers is substantially the same as the first, but in the arrangement of the matter we are pleased to note a great improvement. The different chapters have been systematically subdivided by the introduction of sections and head-lines. Separate chapters have been devoted to the topics of Connecting Carriers and Transportation of Baggage. Though the substance of these chapters will be found in other parts of the old book, yet several new paragraphs, elucidating and expanding previous statements, have been inserted. The author now mentions four exceptions to the general rule that a common carrier is strictly liable in the absence of special contract, viz.: where the loss was caused (1) By act of God; (2) By public enemies; (3) By act of customer; and (4) By public authority.

Much of the former text, which at first sight appears to have been omitted, will be found in the foot-notes, which latter have also been increased by the insertion of the latest cases. A larger and better print helps to swell the size of the present edition. It may be added that the "Forms of Pleadings" have been dropped.

A separate paragraph has been devoted to the important subject of grain-elevators. The author carefully limits the instances where the deposits of grain in an elevator attached to a mill are in the nature of bailments to those cases where the agreement on the part of the warehouseman is to keep enough on hand to respond to all demands; a qualification which is overlooked in some of our Western cases. We think that this topic has been dismissed rather hastily, and regret, among other things, that no reference has been made to the important case of *South Australian Insurance Co. v. Randell*,<sup>1</sup> which contains an able exposition of the opposite and perhaps more strictly accurate view of the legal effect of these grain deposits.

Several useful additions are to be found in the chapter on Pledge and Pawn, which, however, lack of space prevents us from referring to at length.

With regard to the question whether a common carrier has a lien as against the true owner on goods which he has transported at the request of a thief, the author states the law as settled, that he has no such lien. While conceding that such should be the law, we are unable to assent to the proposition that it is the law, at least in England. The point has not been adjudicated of late in that country; but there are several recent dicta in which carriers and innkeepers are placed on the same footing in respect to their lien on converted goods, and it is not at all improbable that an English court would to-day be influenced by the mistaken analogy. The doctrine was first put forward in the *Exeter Carrier Case*.<sup>2</sup> There goods had been delivered to a carrier by a thief, and it was held that a lien existed on them "for the premium due on

<sup>1</sup> L. R. 3 P. C. Ap. 101.

<sup>2</sup> Cited by Holt, C. J., in *York v. Grenaugh*, 2 Ld. Raym. 866.

the carriage" against the right owner. In *Waugh v. Denham*,<sup>1</sup> Pigot, C.B., cites this case with approval, and states that it has never been overruled in England. The same judge remarks later on that "If a carrier knows that a thief gives him the goods of the true owner to carry, he cannot charge the owner for the service which he has knowingly rendered to the thief in the carrying of the goods," from which the natural implication is, that he could charge the owner if he did not know of the tortious bailment. See also Whitaker on Lien, p. 92; Browne on Carriers, p. 337; Cross on Lien, p. 28; Hutchinson on Carriers, § 489. It is thus seen that on the few occasions on which this question has been decided or adverted to in England, the carrier's right to a lien has always been upheld, and in view of this authority, meagre as it is, we must consider the author's statement as altogether too sweeping.

It is to be regretted that Mr. Schouler did not discuss at length the question as to the exact nature of a ticket, — whether it is a mere token, evidence of a contract, or the contract itself. The author seems to regard it as evidence of a contract; and while we are not prepared to differ with him, yet we are inclined to think that much can be said in favor of regarding the ticket as the contract proper,<sup>2</sup> — a promise on the part of the company, in consideration of the money paid, to carry the holder as indicated. In this view of the case it only ceases to be such on cancellation, when it becomes a token or voucher showing that the passenger has paid his fare. For a careful discussion of this question see Mr. Beale's article, HARVARD LAW REVIEW, vol. 1, p. 17.

In the last paragraph of his book the author points out that if in many cases he may appear to have avoided expressing an opinion or stating the law, this is due to the fact that the subject of Common Carriers, in its present phase, is one of such recent and rapid growth, that the courts themselves have not yet reached satisfactory or definite conclusions on many important points.

We think that the book, in its present shape, will warrant the careful study of any one interested in the subject of which it treats.

W. W.

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THE LAW OF COVENANTS FOR TITLE. By William Henry Rawle, LL.D. Fifth edition. Boston: Little, Brown, & Co. 1887. 8vo. pp. 708.

It is now fourteen years since the last edition of this standard treatise was published. In that time the law on the subject has been much enlarged by decisions and modified by statutes both in England and the United States. It has been the aim of the learned author in this, the fifth edition, more to keep his book abreast of the times, than to change materially his views previously set forth. In order to do this it has been necessary to add much new matter. As an offset, some of that which has now become obsolete has been omitted, and still more of the old has been condensed, so that the size of the volume remains about the same.

Among the heads where the greatest change has been made are the form of covenants, covenants by married women, implied covenants,

<sup>1</sup> 16 Irish C. L., at 409, 1865.

<sup>2</sup> Henderson v. Stevenson, L. R. 2 H. L. Sc. 470, per Ld. Cairns; *Burke v. S. E. Ry. Co.*, 5 C. P. D. 1, per Ld. Coleridge.



and the operation of covenants by way of estoppel. The latter subject has been rewritten to some extent, but the author still retains the general position which he has always occupied, though he now attempts "to show that most of the doctrine is equitable and not legal." It is a part of the law which has been the subject of much recent legislation: and the effect of covenants in passing title by direct operation of law has been wonderfully increased by statutes, especially in the Western States and Territories.

The subject of covenants which run with land is another which has received considerable attention at the hands of legislative bodies. In England there has been the Conveyancing and Law of Property Act of 1881. "On this side of the Atlantic, it will be found that the doctrine of the American cases is not standing the test of practical experience," and statutes, codes, and the tendency of decision are effecting the necessary remedy.

The edition is a considerable improvement over the last one in its enlarged and better classified index, and in the division of the subject-matter into paragraphs, — features which will be appreciated by every reader.

H. M. W.

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THE COMIC BLACKSTONE. By Gilbert Abbott A'Beckett. New edition, revised and extended by Arthur Wm. A'Beckett, Barrister-at-Law, and illustrated by Harry Furniss. Bradbury, Agnew, & Co. London, 1887. 8vo. pp. 324. (Received from C. C. Soule, Boston.)

This classic of legal humor has shared the sacrilegious fate of the great English law-books in undergoing a new edition incorporating the recent statutory changes into the text. The present handsome edition has been a work of filial devotion in the son of the author. The additional matter incorporated preserves fairly the spirit of the original text, so that the work, in becoming more useful to English students, has lost none of its inimitable charm. Mr. Furniss' illustrations are in his happy style, familiar to readers of *Punch*. Those whose heads have ached over the great commentaries will find a delicious revenge in reading this book, while students preparing for an examination in Blackstone would not err if they followed the example of their English fellow-sufferers in using the book for an enjoyable and profitable review.

B. H. L.

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THE COLUMBIA LAW TIMES, October, Vol. 1, No. 1; published by the Students of the Schools of Law and Political Science in Columbia College, New York, 1887.

The first number of this new venture in the field of college journalism contains the address delivered by Prof. Dwight to the graduating class of 1887; a discussion of the Cy Pres doctrine by S. A. Anderson; and a short article on the School of Law and the School of Political Science, by Prof. Smith. In addition to these articles there is a clear statement of the now finally settled case of the Anarchists, together with items, lecture notes, recent cases, book reviews, etc. The correspondence consists of a very favorable criticism of the work and methods of the Harvard Law School. In general appearance and make-up the "Law Times" is evidently modelled on our own REVIEW, with what success is not for us to say.

A TREATISE ON THE LAW OF DIVORCE. By A. Parlett Lloyd, of the Baltimore Bar. Boston and New York: Houghton, Mifflin, & Co., the Riverside Press. 1887. 8vo. pp. 323.

To call such a work a treatise is a misnomer, for it contains no discussion of the fundamental principles of the law of divorce. It is, in brief, a statement of the various causes for which divorce will be granted in each of our States and Territories, with a concise and accurate recital of the decisions supporting such statements, together with interesting statistics and other data relating to the subject. The work is an outgrowth of a little pamphlet published by Mr. Lloyd some few years ago, which met with sufficient success to merit a second appearance in a new and enlarged form.

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THE AGENT'S HAND-BOOK OF INSURANCE LAW (*Fire Insurance*). By Charles C. Howe and Walter S. Nichols. New York: The Insurance Monitor. 1887. 8vo. pp. 95.

This little work is intended simply as a legal guide to the agent, with hints and suggestions in regard to matters of practical importance which are constantly arising between agent and company, or agent and policy-holder. It is intended, not as a law-book to determine the rights of the parties when once a controversy has arisen, but rather as a guide to avoid any such controversy. For the settlement of practical questions seldom touched on by current law-books it is a convenient and suitable book to which to turn.

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SUPPLEMENT TO FORMATION AND REGULATION OF CORPORATIONS UNDER THE LAWS OF PENNSYLVANIA. Compiled by M. M. Meredith and H. D. Tate. Allen, Lane, & Scott. Philadelphia, 1887. 8vo. pp. 123.

In a book of about one hundred pages the compilers have brought their work, published in 1883, down to the present day. The book includes, besides all corporation statutes passed at the sessions of the Legislature in 1885 and 1887, necessary forms and opinions of the Attorney-General on the construction of the corporation laws, rendered up to September, 1887.

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THE DOCTRINE OF CY PRES, as Applied to Charities. By Robert Hunter McGrath, Jr. T. & J. W. Johnson & Co. Philadelphia, 1887. 8vo. pp. 74. This essay, to which was awarded the Meredith Prize for 1887 by the University of Pennsylvania, gives evidence of sound study and careful thought on an interesting and intricate doctrine of the law.

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PRINCIPLES OF THE LAW OF TORTS. By Francis Taylor Piggott, M. A., LL. M., of the Middle Temple, Barrister-at-Law, author of "The Law and Practice Relating to Foreign Judgments and Parties out of the Jurisdiction." London: William Clowes & Sons, Limited. 1885. 8vo. pp. 416.

# HARVARD LAW REVIEW.

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## RECOVERY OF MONEY PAID UNDER MISTAKE OF FACT.

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THE recovery at law of money paid under mistake affords one of the most striking illustrations of the equitable nature of quasi-contractual obligations, — obligations that are, unfortunately, usually called in our law, contracts implied in law.

Where A intentionally pays money to B, and B intentionally receives it as payment from A, plainly the legal title has passed; and a Court of law, if the money has been paid under a proper case of mistake, compels B to restore to A the money so received, not because the Court does not regard B as the legal owner thereof, but because it is inequitable that he should retain it.

The equitable principle which enables A to recover in this case, as in quasi-contractual obligations generally, is the principle of enrichment: "One shall not be allowed to unjustly enrich himself at the expense of another;" or, as it is usually stated in the common law, "One shall not unjustly profit at the expense of another."

It is proposed in the present article to deal with the general principles under which one is allowed to recover money paid under mistake of fact, and not with their application in detail to specific facts, except so far as it is necessary to a correct understanding of the principles. And the question will be discussed

mainly with reference to the remedy at law. Indeed, it has recently been decided<sup>1</sup> by Jessel, M. R., that the sole remedy of a party seeking only to recover money paid under mistake of fact, is at law.

Although an action at law in account to recover money so paid was maintained at an early day,<sup>2</sup> and the right to recover therefor, in *indebitatus assumpsit*, for money had and received was regarded as settled law in the time of Lord Holt,<sup>3</sup> yet bills in equity have also been maintained.<sup>4</sup> In principle it is impossible to distinguish between fraud and mistake: in each case, if there is no mistake as to identity of parties or subject-matter, a transfer with intent to convey title passes the legal title; and as the legal title is passed with plaintiff's consent without a contract in fact on the part of the person receiving it to transfer it back, the plaintiff's claim, if any he has, must be an equitable one. That fraud and mistake are alike in this respect was recognized by Lord Holt, in *Tomkyns v. Barnet*.<sup>5</sup> And it is a general principle that equity will not relinquish its jurisdiction, because a Court of law also gives a remedy.<sup>6</sup> In *Varet v. N. Y. Ins. Co.*, *supra*, Chancellor Walworth says: "The equitable action of assumpsit is now allowed in many cases . . . where the remedy was originally in equity only. But the fact that a remedy exists at law in such cases does not deprive this Court of its ancient jurisdiction to grant relief here." Or, in the language of an English Chancellor, "This Court is not at liberty to give up its jurisdiction because Courts of law have fallen in love with it." It would seem, then, that Jessel's decision cannot be supported, and in this class of cases a Court of equity has concurrent jurisdiction with a Court of law.

What mistake of fact, all other necessary conditions existing, will a Court regard as sufficient?

In *Aiken v. Short*,<sup>7</sup> Bramwell said: "In order to entitle a person to recover back money paid under a mistake of fact, the

<sup>1</sup> *Lamb v. Cranfield*, 43 L. J. Ch. 408.

<sup>2</sup> *Hewer v. Bartholomew*, Cro. Eliz. 614.

<sup>3</sup> *Tomkyns v. Barnet*, Skin. 411; *Lamine v. Dorrell*, 2 L. Ray. 1216.

<sup>4</sup> *Bingham v. Bingham*, 1 Ves. Sr. 126; *Neal v. Read*, 7 Baxter, 333; *First Nat. Bank v. Mastin Bank*, 2 McC. 438. See also *Conyers v. Hammond*, 2 Cas. in Ch. 81; *Pooley v. Ray*, 1 P. Wms. 355.

<sup>5</sup> Skin. 411.

<sup>6</sup> *Colt v. Woollaston*, 2 P. Wms. 154; *Varet v. N. Y. Ins. Co.*, 7 Paige, 560.

<sup>7</sup> 1 H. & N. 210.

mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

This remark was not necessary to the decision of the case, and it is submitted that it does not give the proper test. The following illustration would seem to prove that Bramwell's test cannot be adopted. A, supposing that B is indebted to him, though B in fact is not, draws an order on B in favor of C, and delivers it to him as a gift. A dies, and after A's death the order is presented by C, in ignorance thereof, and paid by B, who believes A to be alive; but he knows that he is not indebted to A. B has paid the money supposing that, by so doing, he got a good contract against A. Plainly he has no remedy against A's estate. A's order was a mere offer, which was revoked by A's death,—is C to be a gainer at B's expense? Under Bramwell's test he must be; as the fact about which B was mistaken, namely, A's existence, if true, would not have made B liable to comply with the order.

In *Southwick v. First Nat. Bank*,<sup>1</sup> a bill drawn by A on B, payable to A's order, was indorsed by A to C, to whom A was indebted, the understanding between A and C being that C should obtain payment of the bill, and extinguish A's indebtedness with the proceeds. The understanding between A and B was that A was to draw a bill on B, and with the proceeds take up an outstanding bill on which A and B were liable. The bill was presented by C to B, who accepted and also paid the bill, under the impression that A was carrying out his part of the agreement. It was held that the mistake of fact was not of a kind to entitle B to recover the money paid. "It is certainly true," says Earl, J., delivering the opinion of the Court, "that if the drawees had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can retain the money voluntarily paid by them? It is not every mistake that will lay the groundwork for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact, not remotely, but directly, bearing upon the act against which relief is sought. If it were the rule to relieve against mistakes as to remote, or what are sometimes called extrinsic, facts,

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<sup>1</sup> 84 N.Y. 420.

great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawee, who had authorized it to be drawn, and it was held by the defendant, who could lawfully receive payment therefor. There was no mistake as to the intrinsic facts. The facts that the drawers had not acted in good faith with the drawees, or had placed the draft and its proceeds beyond their control, was too remote. The mistake of the drawers was rather as to the application of the money paid by them."

The correct test seems to be suggested in this opinion, namely, the fact about which the mistake is made must not be as to a collateral or extrinsic fact, and the reason for adopting such a test is also suggested in the same opinion, viz., public policy. And public policy requires the adoption of this test, to avoid the uncertainty and confusion that would otherwise attend business transactions. And under this rule of public policy the one person loses and the other gains, not because of the defendant's merits, or the want of merit in the plaintiff, but because to adopt a different rule would endanger business stability. It is because the mistake must not be as to extrinsic or collateral facts that it has been held<sup>1</sup> that if a bank pays, under a mistake as to the state of his account, a check drawn upon it by a depositor, there can be no recovery of the money so paid.

It is difficult to give a test of what is to be considered an intrinsic fact, it being a question which is to be governed by the facts of each case; but a test of this kind would seem to cover most cases. Was the making of the claim against the plaintiff in itself a representation that the party presenting the claim believed in the existence of those facts, about the existence of which the plaintiff was mistaken? If so, the mistake is as to an intrinsic fact.

The mistake must be one about which the plaintiff was not in doubt at the time of payment; for, if he regards the fact as a doubtful one at the time when the claim is made, he cannot be said to have paid under a mistake, but has either paid in settlement of a doubtful claim, or has paid with a view to appearing in litigation as a plaintiff rather than as a defendant, and the law properly says that it is not for him to choose the time for the beginning of litigation.<sup>2</sup>

<sup>1</sup> *Chambers v. Miller*, 13 C.B. N. S. 125. See *contra*, *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281. But compare *Boylston Nat. Bank v. Richardson*, 101 Mass. 287.

<sup>2</sup> *McArthur v. Luce*, 43 Mich. 435.

On this principle it has been held<sup>1</sup> that a party could not pay a claim which he knew he did not owe, and afterwards recover the money, alleging that he paid because of the loss of his evidence, and that he notified the defendant at the time of payment he should bring an action to recover the money on finding his evidence.

It has been already said that the plaintiff's claim rests on the fact of the defendant being unjustly enriched at the plaintiff's expense.

To make out that the enrichment has been at his expense the plaintiff must show a failure of consideration. It can be properly said that the equity in plaintiff's favor is a failure of consideration rather than mistake, and that in this particular class of cases he establishes his equity, namely, failure of consideration, by showing that he parted with the money without receiving a certain equivalent because of a mistake.

The decision in *Taylor v. Hare*<sup>2</sup> is an extreme illustration of this position.

In that case the plaintiff sought to recover certain royalties paid to the defendant under a contract by which the defendant agreed to permit the plaintiff to use a certain apparatus, of which they both thought the defendant was the inventor, and for the invention of which the defendant held letters-patent. It was afterwards discovered that the invention was not patentable; but the Court held that the plaintiff could not recover, notwithstanding the fact that the plaintiff laboring under this mistake paid during its user by him a royalty on an apparatus to which he had the same right as defendant, and that the contract was made by him solely in consequence of this mutual mistake. The Court said, although there had been a mutual mistake as to a material point, there was not a failure of consideration. Perhaps the following statement from the opinion delivered by *Chambré* fairly states the position of the Court: "The plaintiff has had the enjoyment of what he stipulated for, and in this action the Court ought not to interfere unless there be something *ex æquo et bono* which shows that the defendant ought to refund."

As the plaintiff's claim is founded on a profit at his expense, and as it is a purely equitable claim, the expense must be not simply technically a fact, but also be a fact judged from an equitable standpoint.

<sup>1</sup> *Windbiel v. Carroll*, 16 Hun, 101. Compare, however, *Chatfield v. Paxton*, 2 East, 471a. *Guild v. Balbridge*, 2 Swan, 295.

<sup>2</sup> 1 B. & P. N. R. 260.

In *Buel v. Boughton*,<sup>1</sup> the plaintiff made a contract, which, in consequence of a mutual mistake, failed to require the payment of interest; and when the obligation matured, he, by mistake, paid principal and interest. It was held that he could not recover back. It is true that the defendant could say in this case that there was no unjust enrichment; but it is also true that the enrichment was not at plaintiff's expense, as it was a contract which could have been reformed in equity, so as to call for the payment of interest. This principle<sup>2</sup> was inequitably applied in *Jackson v. McKnight*, where the plaintiff, who was indebted to the defendant on an *overdue* bond, secured by mortgage, paid to the defendant an amount claimed by the defendant as interest. The defendant afterwards assigned the bond and mortgage, and the plaintiff, discovering that no interest was due at the time of said payment, brought an action to recover the money paid under mistake.

It was held that he could not recover. "The difficulty," says Learned, J., delivering the opinion of the Court, "is, that at the time when the plaintiff made this payment he was owing a very much larger amount, overdue and payable, on the very obligation upon which the payment was made. Clearly, if he, the plaintiff, had handed to the defendant \$230, to apply on the bond and mortgage, he could not have recovered the sum. But in the present case he claims to recover, because it was intended as a payment of interest, which had in fact been paid, and not as a payment of principal, which had not. The payment, however, was really made on the debt. The plaintiff is, and always will be, entitled to a credit for so much paid thereon. The defendant and the defendant's assignee can enforce the bond and mortgage only for what is payable after crediting this and all other payments. . . . The action to recover money paid by mistake is sustained, because, otherwise, the party would suffer an unjust loss. It should not be extended to cases where the relief is not necessary. It is not necessary in the present case, because the plaintiff can protect himself whenever he is sued on the bond and mortgage."

It is submitted that a different result should have been reached in this case. The money had not been received as part of the principal debt, but as interest, and whatever right the defendant had to apply it in payment *pro tanto* of the principal debt, if he did not so apply it, but sold the bond and mortgage as a debt

<sup>1</sup> 2 Denio, 91.

<sup>2</sup> 17 Hun, 2.



entirely unpaid, the simple question is, whether the defendant shall be allowed to retain the money against the plaintiff, against whom he holds it manifestly without consideration, and compel the plaintiff to recover it by using the payment as a counter-claim or set-off against an innocent party, leaving that party to his remedy over against the defendant, or whether the defendant shall be compelled to pay it to the party to whom it will ultimately go, and from whom he received it without consideration. There was no interest to be paid, and the defendant did not apply it to the extinguishment *pro tanto* of the debt; and the plaintiff's plea in an action brought against him on the bond would be, not payment, but a counter-claim or set-off.

Not only is the expense of plaintiff to be looked at from an equitable point of view, but in deciding whether the enrichment of the defendant is unjust, the question is to be approached in the same way. Hence, if the plaintiff has under mistake paid that which he could not have been compelled to pay either at law or in equity, but which is clearly a moral obligation, there is no unjust enrichment, and the plaintiff is not entitled to relief. "The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received."<sup>1</sup> Hence, if a party should, under mistake of fact as to the date when an obligation matured, pay a claim barred by the Statute of Limitations, he could not recover the money on the ground of mistake.<sup>2</sup> So where A, who purchased a promissory note from the payee before maturity, but by mistake failed to get an indorsement thereof, presented it for payment to the maker, and the maker, supposing that it was duly indorsed, paid it, it was held that he could not recover the money from A, notwithstanding the fact that the payee was largely indebted to him, and was insolvent. The Court said it was not against conscience for A to keep that to which but for a mistake he would have been entitled, both legally and equitably, which, however, owing to a technicality and accident, he could not have collected.<sup>3</sup>

Assuming that the mistake is of a kind recognized by the courts, and that the mistake has resulted in a failure of consideration to

<sup>1</sup> Ld. Mansfield in *Bize v. Dickason*, 1 T. R. 285.

<sup>2</sup> *Bize v. Dickason*, 1 T. R. 285 (semble); *Hubbard v. City of Hickman*, 4 Bush, 204 (semble.)

<sup>3</sup> *Franklin Bank v. Raymond*, 3 Wend. 69.

the plaintiff, and an enrichment of the defendant, is it an answer to an action brought by the plaintiff, for the defendant to say that the mistake was due to plaintiff's negligence?

In the early cases the judges were undoubtedly ready to hold that a plaintiff who had been negligent could not recover, for there are many dicta to that effect. But by the great current of authority it is held to-day that plaintiff's *negligence* is not sufficient to defeat a recovery.<sup>1</sup> In *Lawrence v. American Bank*, *supra*, the Court says: "It is the fact that one by mistake pays money to another to which the latter is not entitled from the former, which gives the right of action, and the fact that the mistake occurs through negligence does not give the payee any better, or the payer any worse, title to the money."

In these jurisdictions where the defendant is allowed to defeat a recovery by showing that he has so changed his position in consequence of the payment that he cannot be put *in statu quo*, there would seem to be no necessity for invoking the aid of the doctrine of public policy in order to defeat a recovery by a negligent plaintiff. But in a jurisdiction where it is held that it is no defence to an action brought to recover money paid under mistake of fact, that the defendant's position has been changed and substantial rights lost in consequence of the payment, it would seem to be highly inequitable to throw the loss brought about by plaintiff's negligence on the defendant.

Assuming a defendant to be ignorant of plaintiff's mistake, can an action be brought without a demand having first been made upon him? Clearly not on principle. The defendant has a title which the plaintiff gave to him. Can it be said that the defendant has been unjustly enriched at plaintiff's expense, in receiving that which the plaintiff gave to him without any fraud on his part? The unjustifiable enrichment, it is submitted, is not a consequence of the receipt, but of the detention against the will of plaintiff of that which was received with his consent. And the defendant should not be subjected to the costs of an action without having first had an opportunity of restoring that which he lawfully received. It has been so held in England<sup>2</sup> and in New York.<sup>3</sup> In Massachusetts it

<sup>1</sup> *Kelly v. Solari*, 9 M. & W. 54; *Devine v. Edwards*, 87 Ill. 177; *Lawrence v. American Nat. Bank*, 54 N.Y. 432; *Lyle v. Shinnabarger*, 17 Mo. Ap. 66 (semble); *Guild v. Balbridge*, 2 Swan, 295. See, however, *West v. Houston*, 4 Harr. (Del.) 170; *Wilson v. Barker*, 50 Me. 447 (semble), *contra*.

<sup>2</sup> *Freeman v. Jeffries*, L.R. 4 Ex. 189.

<sup>3</sup> *Southwick v. First Nat. Bank*, 84 N.Y. 420.

is held<sup>1</sup> that the cause of action arises immediately upon the payment. If, however, a party receives the money knowing of the mistake, then there is immediately an unjustifiable enrichment, and no demand is necessary.<sup>2</sup>

"When the mistake is mutual, both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error. It is just that he should have an opportunity to correct the mistake, innocently committed on both sides, before being subjected to the risks and expenses of a litigation. . . . The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently, and under an honest mistake, knows the whole truth, and consciously receives what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own."<sup>3</sup>

Assuming that, in certain cases, no action can be brought until demand is made, what rules shall be applied in dealing with the Statute of Limitations? The rule ordinarily being that, where a demand is necessary, the Statute of Limitations does not run until demand is made, suppose the plaintiff learns of the mistake soon after the payment of the money to the defendant, is he to be allowed to prolong the defendant's liability indefinitely by failing to make a demand? It would seem not. That which is required of a plaintiff out of regard for the defendant should not be used by the plaintiff to the defendant's disadvantage, when, in denying his right so to use it, nothing inequitable is done. And surely a plaintiff who has it in his power to entitle himself to bring an action at any time cannot complain that he must do so under the penalty of losing his right if it is not exercised within a given period. *Stafford v. Richardson*,<sup>4</sup> though not a case of money paid under mistake, was decided on this principle.

Suppose a bill in equity to be filed against an innocent receiver of money paid under mistake. Is it necessary for the plaintiff to make a demand before filing his bill? As a Court of equity, differing from a Court of law where the successful party is entitled, as of right, to costs, can give costs against a successful party, the result of allowing the bill to be filed without

<sup>1</sup> *Sturgis v. Perton*, 134 Mass. 372.

<sup>2</sup> *Sharkey v. Mansfield*, 90 N. Y. 227.

<sup>3</sup> *Finch, J.*, in *Sharkey v. Mansfield*, *supra*, at p. 229.

<sup>4</sup> 15 Wend. 302.

a demand is not to impose on the defendant, as is necessarily true at law, a bill of costs in a case where, if his attention had been first called to the matter, an action could have been avoided. Waiving the technical difficulties, which seem to be as great in equity as at law, and the objections of public policy, which would seem to dictate that a Court should not encourage a course which would be productive of unnecessary litigation, the argument of hardship, which is so strong at law, does not prevail in equity. A precedent for allowing the bill to be filed without first making a demand is found in those cases where a contract has been made for the sale of real estate in which there are mutual and concurrent conditions, and where, if either party desires to bring an action at law, he must aver in his declaration and prove on the trial a conditional tender on his part, or a waiver by defendant of such tender. It has been held<sup>1</sup> in such cases that the plaintiff can file his bill in equity for specific performance without first making a demand, with the consequence that, although equity gives him a decree, it awards costs to the defendant. Now, in such a case, it seems as impossible to predicate a breach of contract by the defendant, as it is impossible to predicate of a defendant to whom money has been paid under mistake, an unjust enrichment before a conscious detention thereof. And, unless Courts of equity are willing to recognize the rule in regard to enforcing specific performance without a demand as an anomaly, it would seem difficult to do otherwise than apply the same rules to the case under discussion. The plaintiff's claim being simply an equitable one, the rule that an equity cannot be enforced against a purchaser for value without notice can be invoked by a defendant who has innocently received money paid under a mistake.<sup>2</sup> Although it is beyond the scope of the present article to enter at length upon the question of what constitutes value, it may not be out of place to refer, in this connection, to the case of *Newall v. Tomlinson*,<sup>3</sup> especially as it is necessary to refer to the case on another point. In that case A and B, each acting for an undisclosed principal, but dealing with each other as principals, entered into a contract whereby A contracted to buy, and B contracted to sell, certain cotton. Weight-lists were furnished by

<sup>1</sup> Pomeroy's Specific Performance of Contracts, § 363.

<sup>2</sup> See *Ins. Co. v. Abbott*, 131 Mass. 397; *Southwick v. First National Bank*, 84 N. Y. 420; *Edgerton v. Youmans*, 16 Hun, 28.

<sup>3</sup> L. R. 6 C. P., p. 405.

the warehouse-keeper to both A and B. By a mistake made by B's clerk in adding up the figures, the weight appeared to be greater than it really was, and led to an overpayment by A. B at the time of the sale had made advances to his principal on the cotton, and on receiving the money applied it in extinguishment of this indebtedness. After B's principal became insolvent A discovered the mistake, and, B refusing to refund the overpayment, sued for money had and received. It was held that the plaintiff could recover. In behalf of the defendant the rule was invoked that, in the case of money paid under mistake to an agent, there can be no recovery against an agent who has, in ignorance of the mistake, paid the money over to his principal. The Court said that this rule had no application; and on this point the decision is unquestionably sound, for in the case supposed by the counsel, of payment over by an agent, the agent is able to say to the plaintiff, when sued by him, You have no claim against me, as I have done with the money just what you intended I should do, and its receipt by me has not resulted in my enrichment. Whereas, in *Newall v. Tomlinson*, the money was never paid to plaintiff with the intention that he should pay it over to any one. But as the defendant extinguished, as he was authorized to do, a claim which he held against his principal, he was plainly within the rule of a purchaser for value without notice.<sup>1</sup> If the defendant had gone through the form of giving the money to his principal, and then receiving it back in payment of the debt, clearly he would have been within the rule protecting a purchaser; and yet the difference in form can make no difference in the real nature of the transaction.<sup>2</sup> It seems impossible to support the decision unless on the possible ground that the mistake was made in the first place by the defendant through his clerk; and yet if he was negligent, was not the plaintiff equally so, as he had lists before him which would have enabled him to discover the defendant's mistake? Reference is made by some of the judges to the fact that it was defendant's mistake, but there is no reason for supposing that an absence of that fact would have led to a different decision.

The case also suggests another point: How far is a change of position which prevents the defendant being put *in statu quo* an

<sup>1</sup> *Ins. Co. v. Abbott*, 131 Mass. 397; *Southwick v. First National Bank*, 84 N. Y. 420.

<sup>2</sup> *Ins. Co. v. Abbott*; *Southwick v. First Nat. Bank*, *supra*, at p. 436.

answer to an action brought to recover money paid under mistake?

In *Newall v. Tomlinson* certainly the defendant's position was materially changed in consequence of the payment, and in such a case, if the loss which the defendant will sustain, if the plaintiff is allowed to recover, equals the amount which he has received from the plaintiff, it is difficult to understand how he is unjustly enriched at the plaintiff's expense. If the parties are equally innocent, and the defendant has the title to the money in question, it would seem rather that a Court in taking it away from him unjustly enriches the plaintiff at the defendant's expense.

Of course, if it can be shown that the plaintiff, rather than the defendant, is responsible for the mistake, the defendant, rather than the plaintiff, should bear the loss.

There seems to be little in the way of authority on this point. In *Durant v. Ecclesiastical Commissioners*,<sup>1</sup> it was held that the defendant's change of position would not prevent a recovery. This is opposed to the *dicta* found in *Freeman v. Jeffries*,<sup>2</sup> and is certainly opposed to the *dicta* contained in many cases in this country.<sup>3</sup>

What constitutes a mistake of fact as distinguished from a mistake of law will be considered hereafter, in discussing the question of the right to recover money paid under a mistake of law.

*William A. Keener.*

CAMBRIDGE.

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<sup>1</sup> 6 Q. B. D. 234.

<sup>2</sup> L. R. 4 Ex. 189.

<sup>3</sup> *Appleton Bank v. McGilvray*, 4 Gray, 518; *Lawrence v. American National Bank*, 54 N. Y. 432; *Guild v. Balbridge*, 2 Swan, 295.

## OSBORN v. THE BANK OF THE UNITED STATES.

THIS case, as it appears in 9 Wheat. 706, has always held rank as a leading case, and for several reasons : it contains one of the great opinions of our greatest Chief-Justice ; it involved, as reported, the question of the amenability of State officers to judicial process and restraint when acting as such officers ; it also involved the question of the right of a State to levy and collect a tax upon a branch of the Bank of the United States ; and it involved other very interesting questions of constitutional and statutory law and construction.

The recent Virginia Coupon-Contempt cases, just argued <sup>1</sup> before the Supreme Court, have served to bring out the fact of which the writer, at least, had no previous knowledge, — that this case, as it appears in 9 Wheaton, is, as Mr. Bigelow says of *Chandlor v. Lopus*, referred to by Mr. McMurtrie in the last number of the HARVARD LAW REVIEW, *imperfectly reported* ; and to such an extent that, by a curious process of *synecdoche*, an incident of that case has been made, for fifty years apparently, to stand for the whole. The highest authorities seem to have fallen into this error. Thus, in two recent celebrated cases in the Supreme Court of the United States, — *United States v. Lee*, 106 U.S., and *Louisiana v. Jumel*, 107 U.S., — Mr. Justice Miller, in the former case, referring to *Osborn v. Bank* as “a leading case, remarkable in many respects,” describes it as a case which decided that “the decree of the Circuit Court ordering the restitution of money” seized by Osborn or his agent, Harper, from the vaults of the bank, was correct (page 214) ; and Mr. Chief-Justice Waite, in the latter case, refers to it as a case in which “the principle applied in the decision is thus stated in the head-note of the report : ‘A Court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner.’”

The importance of this case as an authority in the Virginia cases led the counsel for the bondholders to examine the original record of the case as it lies in the archives of the Supreme Court,

<sup>1</sup> The opinion in these cases has since been delivered, and will be noticed as soon as it is printed. — EDS.

and it was printed and placed in the hands of the Court upon the recent argument, as well as on the argument in the Court below. The correct statement of the case will be of interest, I think, to the profession at large.

The original bill in the Court below, filed at the September term, 1819, prayed for an injunction against Osborn, Auditor of the State, to restrain him from carrying into execution the provisions of an Act of the Legislature of Ohio, which directed the levy and collection of a tax from all banks transacting business in that State, which, of course, included the branch of the United States Bank, — as the auditor threatened to do. The injunction was awarded in the Court below, and both the subpoena and injunction were issued and served under this bill on Osborn and his agent, Harper.

In September, 1820, leave was given to file a supplemental and amended bill and to make new parties. The amended bill charged that subsequent to the service of the subpoena and injunction on the 17th of September, 1819, Harper, who was employed by Osborn to collect the tax, proceeded to the office of the bank at Chillicothe, and by violence seized \$100,000 belonging to, or on deposit with, the bank; and that the same had then been delivered to Curry, Treasurer of the State, who, in turn, had delivered it to Sullivan, his successor. The bill prayed that Curry, Sullivan, Osborn, and Harper be made defendants, and be decreed to restore the same, *and be enjoined from proceeding further under said Act.*

On September 5, 1821, the Circuit Court made its final decree upon the bill and amended bill, the answers of the defendants Curry and Sullivan, and the exhibits; whereby the bill and amended bill, as to Osborn and Harper, were taken for confessed, and thereupon it was adjudged, ordered, and decreed that the defendants, or some of them, pay over and deliver to the complainants the sum of \$100,000, being the same which was seized and taken from the complainants, with interest thereon from the 17th day of September, 1819, until paid; and it was further adjudged, ordered, and decreed that "the defendants, and each of them, be perpetually enjoined from proceeding to collect any tax which has accrued, or may hereafter accrue, from the complainants under the Act of the General Assembly of Ohio, in the bill and proceedings mentioned."

Mr. Wheaton's report upon this point says only (page 743):



"The cause came on to be heard upon these answers, and upon the decrees *nisi* against Osborn and Harper, and the Court pronounced a decree directing them to restore to the Bank the sum of \$100,000, with interest on \$19,830, the amount of specie in the hands of Sullivan. The cause was then brought by appeal to this Court."

The truth is, as has been stated, that the Court below pronounced a decree which, in terms, after decreeing the return of the sum of \$100,000, with interest upon a part thereof, decreed specifically a perpetual injunction against further proceedings under the Act of the Legislature of Ohio, which was drawn in question.

The result of the affirmance of the decree in *Osborn v. Bank*, by the Supreme Court of the United States, is, therefore,—

*First*: That an injunction will be granted to enjoin State officers from executing an unconstitutional State statute, where complainants show a proper interest therein; and,

*Second*: That when, in the course of the execution of such a statute by such State officers, specific funds have been seized by such State officers, and will be lost to the owner if transferred, an injunction will go to prevent such transfer.

That this was the scope and effect of *Osborn v. Bank* is clear beyond question, not only upon the record, but upon the opinion of Chief-Justice Marshall, wherein, under the fifth head, he discusses the question whether "the case made in the bill warrants the interference of a Court of Chancery," and in which he states the question as follows (page 838):—

"The true inquiry is, whether an injunction can be issued to restrain a person who is a State officer from performing any official Act enjoined by statute; and whether a Court of equity can decree restitution if the Act be performed?" Both these questions were answered in *Osborn v. Bank* by Chief-Justice Marshall in the affirmative, but the answer to the first is the leading thought and conclusion of the case and the opinion.

It is to be hoped that, in some way, the report of this great case may be so amended or supplemented as to bring out clearly its full scope and most important feature.

*D. H. Chamberlain.*

## PRIVITY OF CONTRACT.

PERHAPS the tradition in the elementary law of contracts most thoroughly grounded in the minds of law students is the general proposition that an agreement between A and B cannot be sued upon by C, even though C would be benefited by its performance. It always was, with Harvard law students at all events, an article of faith that rights founded on contract belong to the person who has stipulated for them; and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one not a party thereto.<sup>1</sup> Indeed, it so happened that almost my first experience, as the callow practitioner, occurred in naively asking a New York Court to rule that a plaintiff, being privy neither to the promise made by the defendant to a third party, nor to the consideration given for it, has no standing in court, in seeking to enforce its performance. But the New York Court had different notions, and would rule no such thing. I was informed that the doctrine in that shape had long since been exploded, and that jurisprudence had advanced to a stage where the law operating on the act of the parties created the duty, established the privity, and implied the obligation on which the action is founded. And, upon further investigation, I actually found that no less learned a body of judges than the New York Court of Appeals had, in words at least, distinctly made this legal somersault, and had apparently succeeded in legislating the old principle out of existence.<sup>2</sup>

More than that, before it could recover itself sufficiently to appreciate what had happened, the departure was seized upon with avidity in other jurisdictions, and the heresy is to-day in some States well-established doctrine. The New York Courts, however, were soon put on the defensive, and, pitifully and apologetically squirming and shifting under the heavy burden, began to limit the new rule and hem it about, and to refuse to apply it to cases differing in any of their circumstances from precedents that were not *fac-similes*, until to-day its inventors would hardly recognize their creature. We find a never-ceasing pricking of conscience.

<sup>1</sup> This doctrine is not taught in the School at the present day.—EDS.

<sup>2</sup> *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178.

Thus, the new rule was early applied to the case of the assumption of a mortgage by an assignee from the owner of the equity of redemption, who had made the mortgage.<sup>1</sup>

But when it was attempted to apply the doctrine to the case of an assumption by the assignee of an owner of the equity, who was himself not liable for the payment of the mortgage, the attempt failed. "The Courts are not inclined to extend the doctrine of *Lawrence v. Fox*. . . . Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest."<sup>2</sup>

So, too, where the owner of the equity of redemption makes a second mortgage, and this mortgagee assumes the payment of the first mortgage, the first mortgagee cannot avail himself of that assumption. "In *Burr v. Beers* the amount due upon the mortgage was reserved out of the purchase money, and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage debt."<sup>3</sup>

The necessities of the Court of Appeals develop further distinctions. A retiring partner protects himself against the possible default of a copartner, on the latter's promise to assume the debts of the copartnership, by taking the guarantee of a third person. Held, not available by creditors of the copartnership. *Merrill v. Green*, 55 N.Y. 270, all in spite of *Clafin v. Ostrom*, 54 N.Y. 581. So, too, in the same volume of reports we have the following discrimination:—

Where a new partner assumes certain debts, unliquidated by the old partners, he is liable to these creditors of the former copartnership.<sup>4</sup>

But where the assets of a firm were transferred to A upon his promise to pay the firm's debts, one of which was a promissory note negotiated to plaintiff before maturity, it was held, that A, who was sued upon his promise to pay this note, could set off a claim owed to him by the previous holder of the note. "It would be a great extension of the doctrine of *Lawrence v. Fox* to hold that a promise to a debtor to pay his debt was a direct undertaking of the promisor with each of the persons successively who should acquire the interest of the original creditor, and this construction is not justified when there are no special words indicating that intention."<sup>5</sup>

<sup>1</sup> *Burr v. Beers*, 24 N.Y. 178.

<sup>4</sup> *Arnold v. Nichols*, 64 N.Y. 117.

<sup>2</sup> *Freeman v. Turner*, 69 N.Y. 280.

<sup>5</sup> *Barlow v. Myers*, 64 N.Y. 41.

<sup>3</sup> *Garnsey v. Rogers*, 47 N.Y. 233.

And it has been held that the obligation involved in the condition of a bond is not such a promise as is available to any one, not the obligee of the bond. "But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person; he being neither privy to the contract nor to the consideration, the contract must be made for his benefit, as its object, and he must be the party intended to be benefited."<sup>1</sup>

Where A sold certain property to B, the proceeds of which were to be paid to C, and a warrant of attachment was served upon B, in an action to recover a claim against A, and before these proceeds had been distributed, it was held that the sheriff was entitled to recover from B. It reads like a bit of irony to find Judge James using the words: "Privity of contract was once deemed of some importance in testing the right of one who sought to enforce an agreement. . . . Can it be doubted that the original creditor could maintain an action for the original debt?"<sup>2</sup>

And where a defendant, holding under a warranty deed, by which he had assumed the mortgage made by his grantor, was evicted by paramount title, the covenant of assumption was held not enforceable by the mortgagee, notwithstanding *Lawrence v. Fox* and *Burr v. Beers*. "But I know of no authority to support the proposition, that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void, as between the promisor and the promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found."<sup>3</sup>

But is not the argument with Judge Earl, who, in a dissenting opinion, protests against these artificial distinctions? "The notion that the right of the third party to enforce such a promise depends solely upon the doctrine of equitable subrogation, as defined in *King v. Whitely* (10 Paige, 465) and *Trotter v. Hughes* (12 N.Y. 74), has been thoroughly exploded in *Burr v. Beers*, *Coster v. The Mayor*, *Thorp v. The Keokuk Coal Co.*, and many other cases."

It is no wonder that an occasional Court of original jurisdiction is carried to curious extremes in trying to logically pursue these refinements. So late as January last we were told that where a

<sup>1</sup> *Simson v. Brown*, 68 N.Y. 355.

<sup>3</sup> *Kelly v. Roberts*, 40 N.Y. 432.

<sup>2</sup> *Punning v. Leavitt*, 85 N.Y. 30.

parent had delivered to the child a written agreement made for its benefit with a third person, the contracting parties, because of such delivery, had lost all control over the agreement, for the purpose either of alteration or rescission.<sup>1</sup>

It is with great diffidence that I undertake to formulate these various authorities ; but perhaps the final outcome of the New York cases might be stated to be that where A makes to B, for a consideration that is legal and that does not fail, a promise to do something, which promise is legally enforceable by B, and obtained by him in order to benefit C, C can enforce against A the performance of his promise, unless B sooner obtains compensation for its breach, or releases the promisor ; but that third persons are no longer permitted to sue on contracts, upon the ground simply that, by their performance, they, the third persons, would be incidentally benefited.

"The general rule is, that when two persons, for a consideration sufficient as between themselves, covenant to do some act, which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other."<sup>2</sup>

But, even amended and purified, the existing New York rule represents an anomaly, and in casting about for the origin of the apostasy one comes naturally upon *Sutton v. Poole*, Ventris, 318, as the entering wedge. And yet this venerable precedent was *sui generis*, in that the plaintiff, who claimed the benefit of the contract, was related by blood to one of the contracting parties, who himself had no personal interest in its performance, and therefore might reasonably be deemed to have made the contract solely for the benefit of the plaintiff. And, by way of apology for that decision, it should undoubtedly be remembered, that at the time of its rendition it had not yet been clearly established that love and affection were not a uniformly sufficient consideration. And it is not certain that the earlier authorities, of the nature of *Sutton v. Poole*, were not influenced by the fact that *assumpsit*, being an action on the case, was one in the nature of tort, in cases of which, of course, privity was unnecessary.<sup>3</sup>

And the distinction between covenants and simple contracts is

<sup>1</sup> Knowles v. Erwin, 26 W. Dig. 37.

<sup>3</sup> Dicey on Parties, 85.

<sup>2</sup> Railroad Co. v. Curtiss, 80 N. Y. 219.

clearly recognized by those Courts that accept the doctrine to which exception is taken.<sup>1</sup>

I think that it will be found that most of the cases, in all jurisdictions, in which a stranger to the contract has been permitted to enforce it, and however broad the *ground* of decision given, are distinguishable on their circumstances and divisible into the following heads, — *a.* Novation; *b.* Agency; *c.* Action of money had and received; *d.* Negligence; *e.* Trusts; *f.* Nearness of relationship; *g.* Privity of estate.

*a. Novation.* — This, of course, refers to the substitution of a new obligation for an old one, which is *thereby* extinguished. Strictly, indeed, in that case the plaintiff is not a stranger to the agreement, regarding the whole transaction as a single one. A legal consideration actually proceeds from plaintiff to defendant (see *Bank v. Grand Lodge*, 98 U. S. 123), in which, by-the-by, an admirable criticism of the *Lawrence v. Fox* principle is stated by Justice Strong: "But where a debt clearly exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from his liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity, and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required."

*b. Agency.* — A contract made by an agent on behalf and for the benefit of his principal may, of course, be ratified and enforced by the principal. The promisee is regarded as the agent, though in form the principal.<sup>2</sup>

*c. Negligence.* — Such actions, even where sounding in contract, are really founded upon the defendant's tort. Independently of the express obligation, a defendant's negligence, resulting in injury to the plaintiff, who has not contributed thereto, is actionable. So that, *e.g.*, where a servant, travelling with his master, who applied and paid for his transportation, lost his portmanteau through the negligence of the railway company, the servant was permitted to recover its value from the company.<sup>3</sup>

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<sup>1</sup> See cases *supra*.

<sup>2</sup> See opinions, Johnson, C. J., and Denio, J., in *Lawrence v. Fox*, *supra*.

<sup>3</sup> *Marshall v. York*, 11 C. B. 655.

d. *Money Had and Received*.—This is now generally admitted to be in the nature of an equitable action, so that any party may sue another for money in his possession to which said party, in view of all the circumstances of the case, is equitably (*ex equo et bono*) entitled.<sup>1</sup>

e. *Trusts*.—Where, under an agreement, assets have come into the promisor's hands or control, in trust, express or implied, to pay the plaintiff's claim, the payment can be enforced by the plaintiff; that is, the trustee can be compelled to execute the trust.<sup>2</sup>

f. *Nearness of Relationship*.—These cases are made to rest upon the ground that the person obtaining the promise, and from whom the consideration moves, intends it as a gift to the one in whose favor the stipulation reads. They seem to proceed upon some such theory as that if the promise be not for the benefit of the plaintiff it is not for that of any one, and that, as a question of policy, the one person interested in the performance of an agreement should be permitted to enforce it. It comes very near to being an exception to prove the rule.<sup>3</sup>

g. *Privity of Estate*.—Where the lessee assigns the lease to the defendant upon his agreement to pay the stipulated rent to the lessor, the defendant is liable to the lessor on this, as indeed on all covenants that run with the land. And yet even here the limitation is made that such liability continues only so long as the defendant remains the legal assignee, making it appear the more clearly that the liability arises from the privity of estate, and not from any privity of contract.<sup>4</sup>

It must not be supposed that the Harvard Law School Alumni have been so faithless to the tradition of their Alma Mater as to supinely acquiesce in the legal monstrosity born of the *dictum* in *Lawrence v. Fox*. In a recent case, in which a debtor had absolutely transferred all his property to the defendant, one of his creditors, upon the defendant's promise to pay all the debts, we succeeded in sustaining a demurrer to the complaint of one of those creditors. Judge Wallace threw himself heroically into the breach in *Austin v. Seligman*, 18 Fed. Rep. 519. But, shortly after, the State Courts expressly refused to follow him in a substantially similar case, and our hearts were again made to yearn for the flesh-

<sup>1</sup> *Bull v. Boughton*, 2 Denio, 21.

<sup>2</sup> *Garnsey v. Rogers*, *supra*.

<sup>3</sup> See *King v. Whitely*, 10 Paige, 465; *Knowles v. Erwin*, *supra*.

<sup>4</sup> See *Walton v. Crosby*, 14 Wend. 64; *Mellen v. Whipple*, 1 Gray, 317.

pots of Cambridge. Perhaps we shall get relief from the Field Code, which begins to loom up with terrible distinctness; and already poses as the layman's panacea and the lawyer's dragon. Some of us believe that it will prove a boomerang. Even the Statute of Frauds, it will be remembered, has required interpretation. But I digress, and forget that my subject is a question of privity, while with this code it can never be a question of consideration.

*Jesse W. Lilienthal.*

NEW YORK.

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## THE RESPONSIBILITIES OF AMERICAN LAWYERS.

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IT is one of the popular fallacies of the present day that the responsibility for the state of the law rests entirely with the legislative branch of the government. In reality, this responsibility is in every country shared to a great extent by the legal profession, and the slow development of the law, which results from the writings of jurists, the judgments of courts, and the customary practice of lawyers, is, perhaps, more irresistible, because less noticed, than the violent changes produced by direct legislation. This is especially true in countries where the decisions rendered in actual cases furnish the main source of legal authority. It is not, however, the general responsibility of lawyers in lands where the common law prevails that I wish to consider. It is the more restricted but more weighty duty which is laid upon the legal profession in America by the peculiar nature of our system of government.

The immense power given to the courts by our constitutions is so familiar to us that remark upon it has become commonplace, and for that very reason we sometimes fail to realize its true significance as fully as does the foreigner to whom it is a subject of astonishment. We are in the habit of speaking of our political system as a government by the people, carried on by means of three coördinate branches,—the Executive, the Legislative, and the Judicial; but when these expressions are examined carefully, it is evident that they are misleading, and, perhaps, inaccurate, at least in the



sense in which they are commonly understood. These three branches, in the first place, are called coördinate, and work each in a separate and defined province; and yet, as must of necessity be the case in human affairs, the lines of demarcation are not always clear, and unless confusion is to be endless, a power must exist somewhere to determine the limits of the separate provinces, and to decide controversies in regard to them. The power to do this has been confided to the courts in accordance with the principles of the common law, if not by the express provisions of the Constitution. The judicial branch of the government, therefore, is the final arbiter and ultimate authority on all matters touching the limits of the powers granted by that instrument. It possesses no direct initiative, but it is the sole and final judge of its own rights as well as of those of the Executive and the Legislature, and in this sense, while greatly inferior in force, it is superior in authority to the other two branches of the government.<sup>1</sup>

Now let us consider for a moment the nature of the body in which this vast power is vested. The Executive and Legislature are elected by the people, or by some rough approximation to a

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<sup>1</sup> An extended discussion of the effect which a decision by the Supreme Court on a point of constitutional law has upon the other branches of the government would not be appropriate in this article; but as I have to some extent assumed the correctness of one side of a controversy upon the point, a few words of explanation in a note may not be out of place. A decision by the highest court of appeal has two distinct effects. In the first place, it is absolutely and finally binding on the parties to the suits and all persons claiming under them, and it is binding on no one else. In the second place, it establishes a precedent which, under ordinary circumstances, is morally certain to be followed whenever the same question is again presented to the court; and it is in consequence of this second effect of a decision that the court has virtually power to settle the law. Now, in the United States, all officers of the government are subject to the ordinary rules of the common law (with a few exceptions, in some States, for example, of soldiers called out to suppress a riot, etc.), and although the courts have no general power to command the performance of official duties, yet a public officer can be sued or prosecuted for violations of the law like any other citizen, and his official position or the orders of his superior are no defence to him. If he has done any act in excess of his authority, he is liable for it precisely as any one else who had done the same act would be; and it is for the ordinary courts of common law to decide whether the act in question is beyond his authority or not. If, therefore, the court has decided that a certain statute is unconstitutional, every one knows that he may treat that statute as invalid. He knows that the court will give him redress against any person, whether public officer or private citizen, who injures him under color of its provisions; and he knows that he may resist any officer or other person who attempts to enforce it, and that he will be held harmless for so doing. In many of the continental countries of Europe a public officer is not amenable to the ordinary process of law, either by virtue of a provision that he cannot be sued or prosecuted in the ordinary courts, on account of any act done under color of his office, without the consent of a

majority of the people, and, in a general way, they are expected to carry out the wishes of their constituents; but the Courts stand in a very different position. They are not in any ordinary sense of the word the representatives of the people, and it is not their mission to enforce the popular will. To some extent, it is true, the opinion has prevailed that the judges, like all other public servants, ought to depend for office upon popular esteem or approval; and in many States laws have been accordingly passed providing that they shall be elected by the people for limited terms. But, happily, the influence of such ideas appears to be on the wane, for the lengthening of the terms for which judges are chosen, and the provisions forbidding reëlection, seem to indicate a return to a moral rational view of the functions of the judiciary. If, indeed, it were the duty of the courts to give effect to the wishes of the people upon constitutional questions, our government would be a truly absurd one. The judicial body would then be a sort of additional legislature extremely ill-fitted for its task. But, in fact, the duty of the courts is almost the reverse of this, because the popular desire for a law may very well be presumed from the fact

council composed of his official superiors, or because his acts are cognizable only by special administrative tribunals; and where this is true, it is clear that the judiciary cannot by their decisions bind the other branches of the government. There is, in those countries, one law for the citizen and another for the public servant; and, in fact, the rights and duties of the latter are regulated by a vast body of special law known as the *droit administratif*, which falls entirely outside the jurisdiction of the ordinary courts. By this means the Executive has been made really independent of the judiciary.<sup>1</sup> But nothing of this kind is true in the United States. There is here only one law, administered by one set of tribunals, to whose jurisdictions every one is subject. It follows that the law administered by the courts is the one law of the land, binding on all persons and all branches of the government. This must of necessity be the case so long as public officers are by law and in fact amenable to the ordinary process of the courts, and it is as true of constitutional as of the common law, so far, at least, as the rights of individuals are concerned. The fact is that a great deal of confusion is introduced into this subject by regarding the provisions of the Constitution as a statement of political maxims, instead of a source of positive law. If it is admitted (what no one now attempts seriously to deny) that the Constitution is in effect a law enacted by a body of higher legislative authority than Congress, the question is really cleared of most of its difficulty, for no one doubts that the Executive is bound by a judicial construction of a statute.

The statements in the text must, of course, be understood with the qualification that the courts have authority to determine the limits of the powers granted by the Constitution only when the question is presented in actual litigation. But as there is no question of this sort which may not arise in an actual case, the qualification does not impair the correctness of the statement.

<sup>1</sup> This matter is admirably treated in A. V. Dicey's "Law of the Constitution," London, 1885.

that it has been passed by the Legislature, and the courts are given power to treat a statute as invalid in order that they may thwart the popular will in cases where that will conflicts with the provisions of the Constitution. Now, the Constitution is always older than the law in question, and may be more ancient by a century, so that the court, in deciding that a law is unconstitutional, declares, in effect, that the present wishes of the people cannot be carried out, because opposed to their previous intention, or, perhaps, to the views of their remote ancestors. Of course all our constitutions have a safety-valve in the power of amendment, so that any of them can be changed by a sufficient proportion of the voters, if they persist long enough in the same opinion ; but this, while modifying, does not do away with the fact that it is often the duty of our courts to defeat the immediate wishes of a majority of the people. Stated in such a form, the power of our judiciary is certainly very startling ; and it is even more surprising that a power so extensive should have been placed in the hands of a small number of men, chosen exclusively from one profession, and that among a people who are jealous of the influence of all associations and professions, and who are impatient of authority of every kind. The truth is that our fathers, while admitting the right of the majority to govern within certain limits, believed that there were principles more important than the execution of the popular will, and rights which ought not to be violated by the impulse and excitement of a majority ; and the constitutional provisions established by them remain in force to-day, because we still believe in the sacredness of the principles which they preached. These principles stand on the same ground as moral precepts. The restraints they place upon us are not always agreeable, but we continue to uphold them, because we believe in their inherent righteousness and in their importance to the well-being of the world. The duty of watching over and guarding these fundamental principles, — these legal morals, if I may be allowed the term, — of developing, explaining, and defending them, rests with the legal profession ; and if this is true, it is surely difficult to overestimate the responsibility of lawyers in America.

I have said that the constitutional principles taught by our fathers retain their force to-day because we still believe in them ; but the statement may, perhaps, require some explanation. For a long time the Constitution of the United States was the object of what had been called a fetish worship ; that is, it was regarded

as something peculiarly sacred, and received an unquestioned homage for reasons quite apart from any virtues of its own. The Constitution was to us, indeed, what a king has often been to other nations, — it was the symbol and pledge of our national existence, and the only object on which the people could expend their new-born loyalty. Let us hope that such a feeling will never die out, for it is a purifying and ennobling one; but to-day our national union is entirely accomplished, and we need no symbol or pledge to assure us of the fact. We can no longer expect, therefore, the blind veneration for our Constitution which prevailed in the first decades of the century. This is a time when all forms of government are being put to the test, and our own must approve itself by the excellence of the principles upon which it is built. At the present moment the power lodged with the courts appears, it is true, to be the most stable feature of our government; and, in fact, we are so accustomed to see judicial decisions readily accepted and implicitly obeyed, that we cannot help attributing to them a mysterious intrinsic force. We are naturally in the habit of ascribing to the courts a sort of supernatural power to regulate the affairs of men, and to restrain the excesses and curb the passions of the people. We forget that no such power can in reality exist, and that no court can hinder a people that is determined to have its way. In short, that nothing can control the popular will except the sober good sense of the people themselves. One has only to turn his eyes to France to see the truth of this statement. That country has had a dozen constitutions, each as sacred as such an instrument can be, but they have all been short-lived, and no one supposes that their frail existence could have been preserved by granting to the French courts the powers possessed by our own. The cause of such a state of things is obvious. The French constitutions are the work of a party, and the people at large are more anxious to accomplish their immediate aims than to maintain the theoretical doctrines embodied in these instruments. The reverse of this is true here, and it is because our people care more for their Constitution than for any single law enacted by the legislature that constitutional government is possible among us. So long as such a feeling continues, our Constitution and the power of our courts will remain unimpaired; but if at any time the people conclude that constitutional law, as interpreted by lawyers, is absurd or irrational, the

power of the judiciary will inevitably vanish, and a great part of the Constitution will be irretrievably swept away. Our constitutional law depends for its force, therefore, upon the fact that it approves itself to the good sense of the people ; and the power of the courts is held upon condition that the precedents established by them are wise, statesmanlike, and founded upon enduring principles of justice which are worthy of the respect of the community.

How, then, it may be asked, are the courts to make their decisions respected and approved by the people? By catching the current of popular opinion and leaning towards that interpretation of constitutional questions which the wants of the day appear to demand? By no means. Such a course is of all the best calculated in the long run to bring the judiciary into disrepute, for it makes of them a political instead of a legal body. To suggest it shows an entire want of appreciation of the genius of our people ; and, in fact, the cases in which the bench has suffered the greatest loss of influence have been those in which it has allowed popular excitement, or party prejudice, which is really the same thing, to affect its opinions. What is needed to maintain the esteem in which the courts are now held is a careful study of the principles established by the Constitution, and a clear development of the theories of constitutional law ; not theory in the narrow sense of something contrasted and often irreconcilable with practice. Theory in this sense is nothing more than a set of doctrines, at best the logical result of premises more or less inaccurate. It is extremely easy to manufacture, and is justly an object of suspicion to the community. But what we need in the study of constitutional law is theory in a higher sense. We need that ripe scholarship which regards theory as truth stated in an abstract form, to be constantly measured by practice as a test of its correctness ; for theory and practice are in reality correlatives, each of which requires the aid of the other for its own proper development. It often happens, when some zealous student propounds a striking doctrine whereby all the problems in the world are reduced to the form of a quadratic equation, that a bystander remarks: "That may be all very well in theory, but it will not work in practice." This saying is a very common one, but it is founded on a most pernicious error, for either it uses the word "theory" in the ridiculous sense of something which ought to be true, and would be true if the world were properly constructed, or else it assumes

that a theory may be correct although inconsistent with the facts or practice which it attempts to explain ; whereas in reality a theory which does not agree with the facts, or will not work in practice, is simply wrong. A practice, on the other hand, which is not guided and enlightened by abstract or theoretical study is shortsighted, unprogressive, and extremely likely to be based upon a blunder.

It may seem to the reader that there is no danger of falling into either of these errors in the study of constitutional law, but a careful review of the decisions on the subject, especially those to be found in some of the State reports, will convince him that the judges have been constantly falling into one or the other of these pitfalls, and sometimes, strange as the feat may appear, into both of them at the same time. There are many decisions in which the court evidently had no principle of general application in mind at all ; others where the opinion is based upon some high-sounding but entirely inaccurate generality, which, if literally applied, would overrule half the cases and upset the whole fabric of constitutional law ; and there are not a few cases in which the generality is enunciated with solemn gravity, while it is perfectly clear that it had nothing to do with the decision, which was determined by the judge's general impression of the case. Let me not be supposed to apply any of this language to the decisions of our great constitutional lawyers. On the contrary, I have the highest appreciation of the labors of these men, and I feel that their country owes them an eternal debt of gratitude. Marshall, indeed, who set the tone for his successors, combined the wisdom of the philosopher with the good sense of the magistrate, and it is precisely because these qualities are so rarely united that I wish to insist on the importance of both of them, and to signalize the evils which may flow from the absence of either.

Those persons who regard the provisions of the Constitution, and particularly the ones designed to protect the rights of the individual, not as a mere collection of arbitrary rules, but as a set of principles adapted to promote the happiness and prosperity of the people, will find it easy to believe that these principles, clearly expounded and wisely applied, cannot fail to retain their hold upon the respect of the citizen.

A careful study of constitutional law is especially important at this time, because the fourteenth amendment to the Constitution of

the United States has furnished an opportunity for a review of the decisions of the State courts upon a most important branch of the law. The first ten amendments to the Constitution, including the provision that no one shall be deprived of life, liberty, or property without due process of law, were adopted, as it was early settled, solely for the purpose of limiting the power of Congress. They imposed, therefore, no restraint upon the legislative power of the several States; and as Congress found few occasions to violate this provision, the federal judges were seldom required to put a construction upon it. The State Constitutions, however, contain similar clauses, and the State courts have had abundant opportunities to interpret them. Now, the fourteenth amendment, adopted after the close of the civil war, contains a provision extending the same limitation to the power of the several States, and in this way the acts of the State legislatures which are supposed to violate the rights thereby secured have been drawn within the jurisdiction of the courts of the United States. The great branch of constitutional law, therefore, which depends upon this important part of the Bill of Rights is now being reviewed by the federal judges, who are not bound by the decisions made in the State courts, and yet have the benefit of the experience of a century.

What I have said may appear to touch only the judges, and to have no application to the profession at large. But, in the first place, it must be remembered that the judges are selected from the ranks of the profession, and that in the long run their views upon the importance of constitutional law, and their sense of the great responsibility of their position, must be derived mainly from the profession in which they were bred. It is not, however, only as the great mother of judges that the legal profession is involved in this responsibility. Every lawyer may become engaged in suits turning upon points of constitutional law. He then finds himself arguing questions which among other nations are determined by a popular assembly or parliament of the realm. He argues, moreover, before a court whose decision becomes a precedent, often more difficult to shake than any act of Parliament. Every American lawyer is, in a sense, therefore, a statesman by virtue of his profession, and may at any time find himself called upon to take part in deciding questions destined to leave a lasting mark upon the government of his country. His position, it is true, differs in one very

important respect from that of a member of Parliament, for he appears on the side which he is retained to represent, and not on that which he believes to be right,—a state of things which it is useless to try to explain to a layman, and which to a lawyer needs no explanation. And yet even the layman may be ready to grant that an exalted sense of the importance of the subject, broad views, and a strong grasp of constitutional principles, on the part of the advocates, cannot fail to have a very great effect upon the decision of the court.

Some cynic, who has had the patience to read so far, will, no doubt, remark that the legal profession is not a charitable institution, and that men practise law to get money, and support themselves, and not from philanthropic motives. To this I answer that no profession can be great unless the money-making aims of the individual are leavened by a sense of the importance of his vocation and of the dignity of the body that pursues it. A man who is unconscious of the strength of the *esprit de corps* of a great profession, of its power to inspire its members with a high and noble ambition, and to make itself an end and not a mere means of making money; a man who has never felt this has failed to appreciate one of the most valuable of human qualities,—he has only to turn his eyes to the doctors to see its force, and no careful search is required to find it among lawyers. This is the quality which we need to foster, because its influence upon the moral and intellectual condition of the legal profession is great, and because it is upon that profession that we must chiefly rely for the preservation of constitutional principles in this country.

*A. Lawrence Lowell.*

BOSTON.



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EDWARD T. SANFORD,  
HENRY M. WILLIAMS, *Treasurer,*

SAMUEL WILLISTON.

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WE wish, on behalf of the School, to recognize the generous and practical gifts of the Harvard Law School Association. Although the interest of the students in the work here certainly does not need the stimulus of prizes, yet this offer of a prize essay will serve to direct the surplus energy toward a definite end, and ought to result in the production of genuinely good work. Through the kindness of the officers of the Association we shall publish the prize essay as soon as possible after the award. As only one subject can be treated by this essay, and a prize of this kind, offered annually, ought to arouse some competition, we shall be glad to publish essays on the other subjects which may be deemed by the judges worthy of publication, provided, of course, the consent of the authors is obtained. In this way unsuccessful competitors may have at least the satisfaction of submitting their work to the public for what it may be worth.

THE Harvard Law School Association has given one thousand dollars to the School to increase the instruction in constitutional law. The Association expect to make this an annual gift, in addition to offering an annual prize for the best essay on some legal subject.

It has been the custom in Scotland, until very recently, to set forth regularly in a criminal indictment the number of times the accused has previously been convicted of the crime. A recent act,<sup>1</sup> known as the Criminal Procedure (Scotland) Act, provides that "it shall not be necessary to set forth in an indictment . . . any previous conviction or productions that are to be used against accused, but it shall be sufficient that they be entered in the list of productions to be used at the trial, every such conviction being therein described as a conviction applying to person accused, against whom it is to be used." Previous convictions may lawfully be put in evidence as aggravations against any person accused.

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<sup>1</sup> 50 & 51 Vict. c. 35, Secs. 19, 63, 64, 65; L.R. 24, St. 125.

THE Ohio Legislature at its last session defined anew the rights and liabilities of husband and wife.<sup>1</sup> They are bound by "obligations of mutual respect, fidelity, and support." The "mutual" does not apply to support, taken literally, since a subsequent section provides that the husband must support his family; but if he is unable to do so the obligation becomes "mutual." In the event of the death of either, the other is "endowed" of a life interest in one-third of the real estate of the deceased, and succeeds to one-third of the personalty, except the first four hundred dollars, one-half of which descends to the "widow or widower." They may contract with each other or with other persons as they might if single; but, in transactions with each other, are subject to the general rules applying to persons occupying fiduciary relations. They may "take, hold, and dispose of property, real or personal, the same as if unmarried."

THE Harvard Law School Association offers a prize of one hundred dollars for the best essay on any of the following subjects:—

1. The liability for negligence in the case of *Heaven v. Pender*, 9 Q.B.D. 302; 11 Q.B.D. 503.
2. What limitations, if any, are imposed by the Federal Constitution upon the rights of the States to enact quarantine laws?
3. The history of the law of business corporations prior to the year 1800.

The competition for the prize is open to members of the third-year class only. Essays must be sent to the secretary of the Association on or before the 1st of June, 1888. The prize will be awarded at the meeting of the Association which is to be held in Cambridge on the Tuesday before commencement.

LOUIS D. BRANDEIS,  
*Secretary.*

A CURIOUS survival of an antiquated legal form is described in a letter to the New York "Sun" of November 13.

By the marriage laws of Delaware, every white couple about to marry must give a penal bond of \$200, as a guaranty that there is no legal objection to their marriage, and must also take out a marriage license, unless the banns of marriage have been published in a prescribed manner. The cost of this license, including fee to the clerk, is \$2.50.

As to the marriage of negroes, the law is a relic of the days of slavery, but is still in force, "mainly by the consent of the colored folks themselves, who save dollars by the law."

The statute (Revised Code, sec. 4, chap. 74) reads as follows:—

"Negroes or mulattoes may be married without license or publication of banns, provided that each party (being free) shall produce the certificate of a justice of the county that such party has made before him satisfactory proof of freedom; or (being . . . servant) shall produce the written consent of his master or mistress to the marriage."

This certificate or permit costs only 50 cents. On account of the \$2.00 thus saved by not taking out a license, it is said that even at the present day most negroes when about to marry procure this certificate of freedom. No marriage, however, in which the provisions of the statute were not complied with has yet been questioned.

<sup>1</sup> 84 Ohio Laws, 132.

WE have received the interesting and able opinion delivered November 7, 1887, by Judge Davis, in the Court of Claims, in the French Spoliation Cases.

After a careful review of the authorities the Court decides that the treaties of 1778 were annulled by the United States by the abrogating act of July 7, 1798. It is shown that a limited war existed between France and the United States. The perils from privateers were such that many of our merchant vessels were compelled to arm for their protection; and the Court concludes that the mere arming of such a vessel whose object was trade, even if an instruction or license under the acts of 1798, authorizing her to recapture American vessels, and to take armed French vessels within the jurisdiction of the United States, or elsewhere on the high seas, was found on board, did not authorize her seizure and condemnation.

The naval warfare on the Atlantic coast from the year 1793 to the year 1800 is reviewed at length, to show that the British West Indies were not in a state of blockade, and, therefore, that a provision-laden ship bound for Martinique was not properly liable to condemnation.

The Court also held that, owing to the unfair treatment received by our shipping at the hands of the French, an American man-of-war was entitled to salvage for rescuing an American vessel from a French privateer, although the United States was a neutral nation. The opinion is a very interesting review of the controverted questions between France and the United States during the latter part of the last century.

A PAMPHLET on Trial by Jury,<sup>1</sup> which has been kindly sent to us by Ex-Gov. Chamberlain, contains some interesting statistics of the recent bribery trials in New York:—

“Four trials of indicted aldermen, and one of the briber Sharp, have taken place. The whole number of days occupied by four trials and one re-trial, including Sundays, holidays, and adjournments, was 61, or about 12 each. . . . It is of interest also to note that in the fourth trial the whole number of jurors summoned was 324, the whole number examined, 205; while the prosecution exercised 13 of its peremptory challenges and the defence only 6; that in the fifth trial the whole number of jurors summoned was 1,050, the whole number examined, 594; the prosecution exercising 17 peremptory challenges, and the defence 20. The trial of Jacob Sharp was begun May 16, 1887, the jury was completed June 15, and the verdict of guilty was given June 29. In this trial the whole number of jurors summoned was 2,100; the whole number examined, 1,196; the prosecution exercising 15 peremptory challenges, and the defence 20. In this case 44 calendar days elapsed from the beginning to the end, and, if I am correctly advised, 31 full court days were consumed, 22 of which were occupied in selecting the jury. Thus it appears that, in these five trials and one re-trial about 90 days were actually occupied; about 4,524 jurors were summoned, of whom about 2,610 were examined in order to secure 6 panels, or 72 in number, of trial jurors. Before these jurors, thus selected, four convictions were secured,—three of the bribe-taking aldermen, and the arch-briber,—while one mis-trial of an alderman occurred.”

<sup>1</sup> The American System of Trial by Jury: an address delivered by D. H. Chamberlain, before the American Social Science Association, 1887.

ANOTHER point deserves notice. Cases involving large mercantile or shipping transactions often arise. "Such cases cannot be submitted to ordinary juries with the prospect of correct or even intelligent verdicts. To continue to require that such cases, involving questions not only of intricacy and complication, but of a nature which lies outside the experience and observation of most men, and dependent for correct solution and decision, not on principles of common-sense or common experience, but on the result of minute, varied, complicated, and involved sets or series of transactions, to be viewed not in general or loosely, but with strict reference to details, and with knowledge and appreciation of most difficult and technical questions and rules of commerce and business,—transactions, too, extending often over many years and through many changes in the *personnel* of the actors,—to require such cases, I say, to be submitted to ordinary juries is plainly, in my judgment, to submit to chance and accident what should pass under the scrutiny of minds fitted by some previous training or experience to treat them with intelligence. The legislation, statutory or constitutional, which shall aim to effect the change here contemplated, should, however, be most carefully guarded in its description of the excepted cases, in order not, under the guise of this reform, to narrow in other respects, to the smallest extent, the province of jury trials in the full scope which they have hitherto been given in our jurisprudence."

AMONG other comments called forth by the recent trial of the Anarchists was one to the effect that an acceptance of the pardon by the convicted person was necessary to its validity. This seems to be the law. In the case of *U. S. v. Wilson*,<sup>1</sup> in the words of Chief-Justice Marshall, "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered, and if it be rejected, we have discovered no power in a court to force it upon him. It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." This statement of the law applies to the case of pardons by the executive. If the pardon is by act of the Legislature, "the Court shall give him the benefit of the act, though he waives or refuses it."<sup>2</sup> This is on the ground that "it is considered as a public law, having the same effect on the case as if the general law punishing the offence had been repealed or annulled."<sup>3</sup>

If the convicted person refused the pardon and insisted on the fulfilment of the sentence the situation would be embarrassing. It is hard to conceive of any remedy he would have against the government. The only practical question that could arise would be his capacity as a witness,<sup>4</sup> as the pardon would not be valid. A field of theory is open. For example, would an acceptance of the pardon as the relinquishment of a legal right form a good consideration in a contract?

THE report comes from Iowa of a non-partisan movement in that State to secure the establishment by the new Legislature of what are called "Courts of Conciliation." A description of these courts is given in "The Nation," of November 24.<sup>5</sup>

<sup>1</sup> 7 Pet. 150.    <sup>2</sup> Comyn's Dig., Pardon, H.    <sup>3</sup> 7 Pet., at p. 163.    <sup>4</sup> 1 Bish. Cr. Law, sec. 763.  
<sup>5</sup> The Nation, Vol. XLV., p. 406.

This system has been long and thoroughly tried in Denmark, and with great success. Each local community chooses its own tribunal, generally consisting of three members, selected with reference to their personal qualifications and high standing in public confidence. This tribunal has original jurisdiction of every complaint which might be the basis of a *civil* action. No civil action, therefore, can be heard in any regular Court until it has been first heard in the "Court of Conciliation," and failed to end in an agreement there.

The principals appear in person and tell their own stories, and necessary witnesses are heard; "no counsel are allowed." If the decision of the Court is accepted by both parties the judgment has the same legal effect as that of any ordinary Court; the dispute ends, and "lawyers' fees are saved."

During the first five years of the system, out of 116,483 cases brought before the "Courts of Conciliation," 74,742 were there settled; during the next five years 190,836 were heard and 121,970 settled, "and only one-half of the remainder were ever carried to actual litigation."

In the recent case of *Stone v. Graves*, administrator, the Supreme Court of Massachusetts rules that a man must pay, under certain circumstances, for being shaved on Sunday. The plaintiff shaved a man sixty-nine times, fifty-two times occurring on Sunday. The man died, and the barber sued the administrator to recover. The defendant asked the Court to rule that, because the shaving was done on Sunday, the plaintiff could not recover. Mr. Justice Field, in a short opinion, remarks, that "if Mr. Graves wished to be shaved on the Lord's day in his own house we cannot say, as matter of law, that it was not morally fit and proper that the plaintiff should shave him."

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## THE LAW SCHOOL.

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### IN THE MOOT COURT.

*Coram* KEENER, J.

*Grant v. Attrill.*

The defendant, holding a majority of the stock in a corporation, caused the directors to levy and threaten assessments for the avowed purpose of building works. but with the real purpose of enabling the defendant to get control of all the stock at a nominal price, the directors not intending to collect the assessment from the defendant. The plaintiff fearing that the assessment would be enforced and the proceeds not applied to the legitimate purposes of the corporation, sold his stock to the defendant, and now files this bill to have the transfer set aside. *Held*, That the secret motive of the directors did not make the assessment invalid; and that the fact that the plaintiff had been induced to make the transfer through mistrust of the management and of the way in which the proceeds of the assessment would be used, was not a sufficient ground for setting the transfer aside.

BILL in equity and demurrer thereto.

The bill is brought to set aside a transfer of stock and to have the defendant declared a trustee thereof for the plaintiff.

The bill alleges that the plaintiff subscribed for and was the owner of 200 shares of the capital stock of the "Crescent City Gas Light Co.,"

of the par value of \$100 per share, on which he had paid fifty cents per share; that defendant, having control of a majority of the stock of said Company, caused assessments to be levied and threatened by the directors of said Company, for the avowed purpose of building works, but with the real purpose of enabling defendant to secure all the stock of said Company from the holders thereof at a nominal price, the directors not intending to collect said assessments from the defendant; that plaintiff, fearing that the assessments would be enforced and other assessments levied, and fearing that no part of the proceeds would be applied to the legitimate purposes of said Company, sold to defendant his said stock at \$2.50 per share; that the assessments levied were not enforced; that no further assessments were levied, and that the stock is now of great value.

*H. B. Cabot and W. R. Trask for the Plaintiff.*

*W. A. Hayes, Jr., and W. C. Osborn for the Defendant.*

KEENER, J. The plaintiff asks to have a sale of stock made by him when called upon to pay assessments set aside, and the defendant declared a trustee thereof. He alleges as reasons why the Court should give him such relief: 1. That the assessments were levied, not to advance the interests of the Company, but at the dictation of the defendant to enable him to purchase the stock at a nominal price. 2. That the directors did not intend to collect the assessments from the defendant.

It does not appear from the allegations of the bill that the plaintiff knew of either of these facts when he sold his stock. That he sold his stock, not because of a knowledge of these facts, but because, owing to a want of confidence in the management of the directors, he preferred making a profit of two dollars per share to risking more money in the enterprise, is evident from the statement in the bill that "plaintiff, fearing that the assessments would be enforced and other assessments levied, and fearing that no part of the proceeds would be applied to the legitimate purposes of said Company, sold to defendant his said stock."

The plaintiff, however, contends that the existence of these facts rendered the assessments null and void; and that when he sold, in consequence of a representation that assessments had been levied, the sale was induced by a false representation, to which the defendant was a party. One must not confound the doing of an act with the motive prompting it. The directors in levying assessments merely did what they were empowered to do, namely, called upon the plaintiff to perform his contract. The secret motive, whether good or bad, inducing them to exercise the power could not affect the levy, or change the plaintiff's obligations under that levy. *Oglesby v. Attrill*, 105 U.S. 605 (semble). That the directors did not intend to collect the assessments from the defendant did not invalidate the assessments. Each stockholder has an interest in the subscription contract of every other stockholder that cannot be destroyed by an agreement or understanding such as the plaintiff alleges existed here between the directors and Attrill.

Notwithstanding the existence of such an agreement the defendant could have been compelled to pay the assessments. *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446.

In *Preston v. Grand Collier Dock Co.*, a bill filed by a stockholder to compel certain other stockholders to pay assessments, the directors having refused to collect the assessments on certain stock, was sustained on demurrer.

The Vice-Chancellor (Sir Lancelot Shadwell), in delivering his opinion, says, on page 347 :—

"But . . . my opinion is that there has been an error, which this Court will set right, namely, that when the directors thought to make the calls as they did, they stopped short of that which was their duty, and that they ought to have gone on to direct the same sums to be paid on each of these shares as had been directed to be paid upon the other shares. . . .

"Therefore, it is evident that in whatever manner it is to be done, this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon the same footing with respect to the liability to pay calls."

And knowledge of such an agreement at the time when the assessments were levied would not have justified the plaintiff in refusing to pay the same. *Dorman v. The Jacksonville Plank Road Co.*, 7 Fla. 265; *The Macon & Augusta R. R. Co. v. Vason*, 57 Ga. 314.

In *Macon & Augusta R. R. Co. v. Vason* the action was brought to collect an assessment. The defence set up was, that the directors had permitted other stockholders to pay their subscriptions in Confederate money, and that this act of the directors was illegal. The Court admitted the illegality, but held that it was no defence, saying :—

"We see no authority in the charter whereby the directors were empowered so to act. It seems to have been done *ultra vires* beyond the authority conferred, and the only trouble to the defence seems to be that no stockholder was released from legally called for instalments by this illegal action of the board of directors, and that such instalments can still be collected from them in good money; or, at least, they can be made to contribute on a proper case made equally with this defendant."

The case, then, is reduced to this, the directors having called upon the stockholders for a payment of a portion of their stock subscription, the plaintiff, because of a want of confidence in the directors, sold his stock to the defendant. Under these circumstances he is not entitled to the relief prayed for.

*The demurrer is sustained.*

## LECTURE NOTES.

OF THE LANGUAGE NECESSARY TO CREATE A TRUST. — (*From Professor Ames' Lectures.*)—Whether an instrument creates a trust is a question of fact in each case. The tendency now is to give the words their fair meaning, and many of the old cases would be decided differently at present.

If the distribution among the beneficiaries is left to the honor of the legatee or grantee there is no trust; he must be bound legally.

If property is left to "A, to pay debts," the residue, after the debts have been paid, will go to the testator's representatives; but, if the property is left "subject to the payment of debts," the residue goes to the trustee.

DEFINITION OF EVIDENCE. — (*From Prof. Thayer's Lectures.*)—The state of being clearly seen is the etymological meaning of the word. The French call those things evident which do not need proof, and

evidence is the corresponding noun. In our early law it had the same meaning as it did in Norman-French, and was used to denote writings or documents, as they spoke for themselves. In Smith's "Commonwealth of England," Book II., chap. 18, is an instance of this use.

The word gradually acquired a broader meaning, and in chap. 26 of the same book it is used to include "indices or tokens."

For a long time, however, it has had its present meaning, as may be seen in Finch's "Common Law" (1654), Book III., chap. 1, where it is defined as "anything whatsoever which serves the party to prove the issue for him."

Bentham's definition, as modified by Best, "Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact," is perhaps a good one, but requires a definition of fact. This can be defined by nothing narrower than anything whatever looked at from a certain point of view; that is, as something on which to base an inference. For legal use it must be narrowed by excepting all reasoning in regard to the law of the jurisdiction in question. Evidence does not include this, nor does it include such facts as are taken for granted.

Whatever, therefore, must be shown to the Court is the subject-matter of evidence. As thus used it may include the persons of the witnesses, as well as what they testify, and also any object shown to the jury,—what Bentham and Best call real evidence.

STATUTE OF LIMITATIONS. JOINDER OF TIMES BY SUCCESSIVE DISSEISORS. — (*From Prof. Gray's Lectures.*)—The consecutive possessions of successive independent disseisors, although without privity of estate between them, can, perhaps, be tacked together to give the continuity of disseisin required by the Statute of Limitations. Thus, if A adversely occupies B's land for ten years, and is then disseised by C, C, after ten years' additional adverse occupancy of B's land, will have a good defence in an action of ejectment brought against him by B.

The case is not analogous to the acquiring of title to an incorporeal hereditament by prescription. The adverse user of an easement for the prescribed time gains an absolute title to the easement. To gain this title it is necessary that the adverse use should be continued for the entire time, either by the same person, or by successors who represent the same *persona* or estate. Therefore, if A, after adversely using a right of way for ten years over his neighbor's land is disseised by C, the disseisor, after ten years continued adverse user of the right of way, will have gained no title to the easement; a disseisor does not represent the *persona* of the previous estate, and cannot tack his time to that of his predecessor. (Holmes' Common Law, 368, and cases cited.)

The effect of the Statute of Limitations is different. The Statute 21 Jac. I. c. 16, from which our Statutes of Limitations as to ejectment are commonly copied, provided [S. I. (4)] that "no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years, next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."



Under this statute, the adverse occupancy of the land does not create a right or title in the occupier, but acts as a bar to the remedy of the original owner, who, after twenty years' loss of possession, cannot set up his title against the occupier. This statute, like that of 32 Hen. VIII. c. 2, which it followed, did not run from the time when the defendant's possession was acquired, but from the time when the plaintiff's possession was lost. The statute looked not at the defendant's possession, but at the plaintiff's want of possession.

It would follow from this construction of the statute, although contrary to received opinion,<sup>1</sup> that in the case under discussion, to bar this remedy of the original owner, B, the second disseisor, C, can tack his time to that of his disseisee, A, although he does not represent the same *persona* or estate. No privity of estate or derivation of titles is necessary between the successive adverse occupants. The only essential is that the original owner shall have been kept out of possession the limited time. At the end of that time, the person in possession can plead the Statute of Limitations as defence in an action of ejectment.

This view is supported by the following decisions: *Fanning v. Willcox*,<sup>2</sup> *Shannon v. Kinny*,<sup>3</sup> and *Hord v. Walton*.<sup>4</sup> It is also supported by the *dicta* of Patteson, J., in *Doe d. Carter v. Barnard*,<sup>5</sup> and of Sir John Romilly, M.R., in *Dixon v. Gayfere*.<sup>6</sup> *Smith v. Chapin*<sup>7</sup> holds that the possession of the successive trespassers must be "connected and continuous," although no privity of estate need be shown between them.

A distinction must, however, be noted between the older form of the Statute of Limitations, as generally followed in this country, and the more recent statutes of 3 and 4 Wm. IV. c. 27, which has been followed in some of the more modern American statutes. This statute provides [S. 34] that when an owner's right of entry and right of action have been lost by the operation of the statute, his title also shall be extinguished. This has been assumed by the Courts to mean that the title of the owner out of possession shall be transferred to the person in possession. Under such construction of the statute, by which it absolutely passes the title to the land, the same line of reasoning would apply as to the acquiring title to an easement by prescription. A disseisor should not be allowed to tack his time to that of his disseisee in order to gain such title to the land.

In the cases of *Dixon v. Gayfere* and *Doe d. Carter v. Barnard*, cited above, the Courts in applying this statute have made a distinction as to whether this last disseisor is in or out of possession, whether defendant or plaintiff. In these cases it was held that, although the last disseisor, if still in possession, could have tacked his time to that of his disseisee in order to successfully defend against an action of ejectment brought by the original owner, yet having lost the possession, he could not so tack the times in order to regain the land when it had come into the possession of the Court for settlement of title, or into the hands of a mortgagee of the original owner.

An examination of the cases cited in the reference given above from

<sup>1</sup> 3 Washburn, Real Prop. (5th ed.), 157, 176.

<sup>2</sup> 3 Day, 258.

<sup>3</sup> 1 A. K. Marsh. 3.

<sup>4</sup> 2 A. K. Marsh. 620.

<sup>5</sup> 13 Q. B. 945, at 952.

<sup>6</sup> 17 Beav. 421, at 430.

<sup>7</sup> 31 Conn. 530.

Washburn on Real Property, in support of the view that the Statute of Limitations passes the title, and that successive disseisors cannot tack their times, will show that in many, if not most, of the cases the distinction between the older and more recent forms of the statute is overlooked, as well as the distinction between a disseisin, which will give a good defence as a bar to an action, and one which will pass a title upon which an action can be maintained.

SALE WITHOUT A CONTRACT. — (*From Prof. Keener's Lectures.*)  
— The case of *Mactier v. Frith*, 6 Wend. 103, Langdell's Cases on Contracts, 77, raises the question whether there can be a sale without a contract. If there can be, then the decision in that case is not in conflict with the decision in *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, Langdell's Cases on Contracts, 72.

It is usual to speak of a sale as an executed contract, but it is submitted that it is not necessarily so. The term *contract* implies an obligation to do or refrain from doing something, because of a promise or covenant made by the party alleged to have contracted.

Suppose that A's horse is in B's possession, and A writes to B: "Deliver to the Adams Express Company a package containing \$500, properly addressed to me, and the horse is yours." At the moment B deposits the package, the horse becomes B's, the money A's.

Now, what obligation has either of the parties contracted or performed?

B, the offeree, was asked, not to make a promise, but do an act; and as he has simply complied with the terms of the offer, it can hardly be claimed that he has either contracted or performed an obligation. He has simply availed himself of the privilege conferred upon him by an offer.

What obligation has A contracted? If it be said, an obligation to sell, the answer is that he was under no obligation until B did what the offer required to be done, and that the doing of the act by B could not precede the passing of the title, so as to create such obligation, as by the terms of the offer the title was to vest simultaneously with the deposit of the money. To say that A has contracted to sell is to say that you can have a contract in which there is not an interval of time between its creation and performance; which is performed without any act on your part, and which can never be broken.

It has been suggested that A contracts not to interfere with B's possession. To say this is to attribute to the parties that of which neither of them thought, viz., the possibility or probability of A's attempting to interfere with B in the enjoyment of his property and the necessity of guarding against it by a contract. A count in *assumpsit* framed on such a theory would indeed be a novelty.

If A should interfere with B's property he would commit a tort, and could be sued as a tortfeasor.

The transfer of title to personal property would seem to rest, not on contract, but on mutual consent. A can pass title to the horse to B without contracting, if he chooses to give him to B, and B can pass the title to A to \$500 in the same way. Now, the difference between a gift and a sale of personal property is, that in the latter the title is transferred in exchange for money. And as B can give money to A, and A can give the horse to B, it would seem that the two can be exchanged without a contract.

The case of *Bussey v. Barnett*, 9 M. & W. 312, is an authority in favor of the position here taken. In *Bussey v. Barnett* the defendant was allowed, under a plea of never indebted, to prove payment, on the ground that the sale being for ready money, there was no promise to pay, but immediate payment. So in the case supposed there was not a promise to sell, but an immediate sale.

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## CORRESPONDENCE.

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### COLUMBIA LAW SCHOOL.

In speaking of the work of the Columbia Law School I shall attempt to describe, in a general way, the subject-matter taught there, and to say a few words of the manner in which it is taught.

The instruction given in the school is divided into prescribed and optional work. The prescribed work embraces lectures on municipal law, which includes contracts, real property, torts, evidence, equity jurisprudence, and pleading and practice. The optional work includes lectures on constitutional law, criminal law, and medical jurisprudence. To obtain a degree of LL.B. no optional work need be done. It is sufficient if the course on municipal law is taken. However, by taking a certain amount of optional work, the degree of LL.B. *cum laude* may be obtained, and graduates of colleges are also eligible to a degree of A.M., provided they do a certain portion of the work of the school of political science, of which the lectures on Roman law, constitutional law, and constitutional history form a part.

Two years of study at the law school are necessary for a degree. The first year is set apart for the study of the law of contracts and of real property. For the purpose of introducing the student to the law of contracts, such parts of "Blackstone's Commentaries" as relate to the consideration of law in general, the elementary laws of contract, and the definition and discussion of the nature of rights and wrongs, are first put before the student. All the rest of the first half-year is devoted to "Parsons on Contracts." The general law of contracts, together with the law relating to the subject-matter of contracts, including sales, agency, partnership, bills and notes, insurance and shipping, is thus considered. The last half-year is devoted to the law of real property; and the second book of "Blackstone's Commentaries," together with Washburn's "Treatise on Real Property," are the text-books used for this purpose. This ends the work of the first or junior year.

The second year opens with the study of torts. Addison's "Torts" is put before the student; after that comes Greenleaf's and Stephen's treatises on the law of evidence. Those men who purpose to practise in New York then take up the "New York Code of Civil Procedure," while those who intend to practise in other States study "Stephen's Pleading" and a short course on equity pleading. The year winds up with Bispham's "Equity Jurisprudence" and a general review of the work of the two years.

The study of constitutional law, constitutional history, medical jurisprudence, and criminal law is conducted entirely by lectures. Each course is entirely optional, and need not be taken by candidates for the degree of LL.B.

The manner of teaching law at Columbia, as is apparent from the summary of the work just given, is conducted by lectures and the study of text-books. It has been said that the study of cases is disregarded. But this is not strictly true. It is true that the text-books are treatises, and not selected cases, as is the method at Harvard. But, nevertheless, in the course of the lectures leading cases are pointed out to the student, with which he is expected to acquaint himself, and in this way much that seems ambiguous from a text-book is cleared up.

But a most important means of instruction are the lectures. These occupy about one hour and three-quarters each day, and attendance on them is compulsory. They are not, strictly speaking, what are popularly known as lectures. Prof. Dwight's method, which is followed by Prof. Lee and Prof. Chase, is what might be called a Socratic method. Prof. Dwight is a perfect dialectician, and his custom is to ask each student in succession questions on the text. He delights in nothing so much as an erroneous answer, not for the sake of snubbing the student, but because it gives him an opportunity to elucidate the law more clearly. By a series of artful questions he makes the student see the absurdity of his position, so that at last, after a considerable discussion, he is very ready to change his opinion.

At Columbia, too, as at Harvard, Moot Courts are held, and Law Clubs are encouraged. Many students, however, are in law offices, so that not so much attention can be given to the latter.

One of the most useful branches of the school are the "Quizes." Of these there are two, the Junior Quiz and the Senior Quiz. From each class, as it graduates, a prize-tutor is chosen, who is appointed for three years. It is the business of these tutors to conduct the "quizes," and the quiz consists in a review of the work of the school just gone over. The tutor takes the position of the professor, and conducts his quiz in the same manner as the professor conducts his lectures, except that, as his purpose is to review rather than to demonstrate, his treatment of the subject is much more general. The quiz is one of the most useful branches of the school, and the attendance at the quiz well demonstrates this fact.

Of course the course at Columbia, as it attempts to cover in two years what Harvard does in three, is not so thorough. But the number of students who successfully pass the examination for admission to the New York bar, and the high grade they take in comparison with the graduates of other schools, and other applicants for admission to the bar, show that the school in its two years does all that can be expected in that limited period.

P.

## RECENT CASES.

AGENCY — RATIFICATION. — A, a collector employed by B, deposited in the defendant bank, without the knowledge of B, certain sums of money, designating as payee in the bank register "B. by A." Six certificates of deposit at different times were thus issued to A, payable to the order of B, and all were subsequently paid to A, upon being indorsed "B. by A." The certificates of deposit were never in B's possession, and it did not appear but that each new certificate was procured partly or wholly with funds derived from payment of the previous one. Upon A's death, B, for the first time learning the facts, sued the bank for the total face value of the certificates. *Held* (two judges dissenting) — The depositing and the withdrawing were distinct acts, so that one can be ratified without the other. The plaintiff is entitled to the face value of the certificates. *Honig v. Pacific Bank*, 15 Pac. Rep. 58 (Cal.).

AGENCY — RATIFICATION. — The superintendent of the cloak department in a dry-goods store had authority to purchase for that department, and all invoices and correspondence relating to it were at once turned over to him. The plaintiff's salesman applied to him for orders, and was told that the stock was already larger than the firm allowed, but that, if no statements of account would be sent to the firm, goods might be sent on with invoices as usual, and he would pass the invoices as fast as he could. The plaintiffs were informed of the scheme and assented to it. Large quantities of goods were sent under this arrangement, and many of them disposed of in the usual course of trade. When the defendants learned of these transactions they found it impossible to distinguish goods that had not been paid for, and they were sold in the usual way, but other goods afterward received from the plaintiffs were returned. It was held that selling the goods under these circumstances was not a ratification of the acts of the superintendent, and the plaintiffs could not recover for goods bargained and sold, but there was an intimation that they might have other remedies. It was further held that mailing invoices to the defendants' address did not affect them with notice that the goods had been sent. *Schutz v. Jordan*, 32 Fed. Rep. 55.

AGENCY — USURY — RESERVATION OF AGENT'S COMMISSION. — The plaintiff's agent, in negotiating a loan to the defendant, took a note bearing the highest legal rate of interest, and reserved a small portion of the money lent as compensation for his services. It was not shown that the principal knew of this charge. *Held* — "The authorities are overwhelming that the contract is not usurious." *Williams v. Bryan*, 5 S.W. Rep. 401 (Tex.).

The Court say: "Whether in a transaction of this character, a payment by the borrower to the agent of the lender of a fair compensation for his services in effecting the loan, though with the knowledge and consent of the latter, should in any case be held to make the contract usurious, may be doubted." The loan was held to be usurious where an excessive compensation was retained by the agent with the knowledge of the principal, in *Pfenning v. Scholer*, 10 Atl. Rep. 833 (N.J.). It is held in *Barton v. Farmers' & Merchants' Nat'l Bank*, 13 N. E. Rep. 503 (Ill.), that a promissory note providing that in case of non-payment when due, if placed in the hands of an attorney for collection, an attorney's fee of \$30 shall be paid by the maker, is not usurious. It cannot matter that the contract for compensating the attorney is executory, not executed.

CERTIFICATE OF DEPOSIT — STATUTE OF LIMITATIONS. — A certificate of deposit is a promissory note, and recovery is barred after the lapse of six years from its date. *Mitchell v. Wilkins*, 33 N.W. Rep. 910 (Minn.).

The Court say that, being promissory notes, they should follow the same rules for the sake of uniformity. The fundamental error was in holding notes payable "on demand," to be due immediately without demand. And there seems to be no good reason for extending the principle to certificates of deposit, but three reasons for not so doing: (1) They contain a stipulation "to be paid on the return of the certificate properly endorsed," which, being part of the contract should be heeded just as "on demand" should have been in the case of

demand notes. (2) The custom of bankers to pay at their banking-houses and not where they find the certificate, as is the case with notes. (3) The analogy of bank-notes, which have repeatedly been held not within the statute.

The weight of authority is probably adverse to *Mitchell v. Wilkins*. See *contra*, *Birch v. Fisher*, 51 Mich. 36 (*semble*); *Lynch v. Goldsmith*, 64 Ga. 42, 50 (*semble*); *McGough v. Jamison*, 4 Pennyp. (Pa.) 154; *Fells Point Inst. v. Weedon*, 18 Md. 320; *Bellows Falls Bank v. Rutland Bank*, 40 Vt. 377; *Munger v. Albany Bank*, 85 N.Y. 580; *Smiley v. Fry*, 100 N.Y. 262; *Renichler v. Kunkelman*, 17 Bradw. (Ill.) 343; *Shute v. Pacific Bank*, 136 Mass. 487; *Girard Bank v. Bank of Penn.*, 39 Pa. 92.

Accord, *Tripp v. Curtenius*, 36 Mich. 494; *Brummagin v. Tallant*, 29 Cal. 503; *Curran v. Witter*, 31 N. W. Rep. 705 (Wis.).

For many cases on the subject see "Review of case *Citizens' Bank v. Brown*" (Ohio), Chicago Leg. News, Sept. 10, 1887.

CONVERSION — CHATTEL MORTGAGE. — A gave a chattel mortgage to B with a clause empowering B to sell on default of any condition in the mortgage, and also authorizing him, for further security, to take possession of the chattel at any time. Before the mortgage became due B took possession under the last clause, and having threatened to sell it, A tendered him the amount of the debt and interest, but he refused it and sold the chattel. Trover was brought at once, and allowed. *Harder v. Hosp*, 34 N.W. Rep. 145 (Wis.).

The Court do not suggest how they support the action without right of possession in the plaintiff.

CORPORATION — CHARTER — LIABILITY AFTER A LEASE. — A street-car company by its charter was made liable for all injuries caused by the negligence of its servants in operating the road. The company leased its property to a second company, which agreed to assume all liability, defend all suits, and pay all judgments against the lessor company. The lease was subsequently sanctioned by an act of the Legislature, which did not expressly exonerate the lessor from liability. The plaintiff was injured by the negligence of the servants of the lessee. *Held* — The lessor could not relieve itself of liability without the consent of the State. A note collects a number of recent cases to the same effect. *Breslin v. Somerville Horse R. Co.*, 13 N.E. Rep. 65 (Mass.).

EASEMENT — STREETS — TELEPHONE POLES. — The defendant, with the consent of the city of St. Paul, erected poles in front of plaintiff's lot. The fee of the street was in the plaintiff. The Court below ordered the poles removed, and granted a perpetual injunction. The Chief-Justice being ill, the four remaining judges are equally divided, and the judgment is confirmed. They give no reasons, and say: "We can render no decision which can be deemed to establish the law." *Willis v. Erie Co*, 34 N.W. Rep. 337 (Minn.).

EQUITY JURISDICTION — BILL OF PEACE. — The plaintiff leased quarry lands from the assignor of the defendant. The assignor, as well as the defendant, used the land as a farm. The defendant commenced to quarry marble. The bill alleged that the quarrying of every stone was a trespass, and, to prevent a multiplicity of suits, asked for an account of the stone taken out and an injunction to restrain future trespasses. Relief granted. *Dougherty v. Chesnutt*, 5 S.W. Rep. 444 (Tenn.).

In point of jurisdiction this seems a departure from common-law rules. The question of whether or not an act is a trespass is a common-law question, to be determined by a common-law court with a jury. Even in those States where equity and law are united, the question of trespass is submitted to a jury, though a separate action is not necessary. But in Tennessee, where such seems not to be the case, the plaintiff should first have been compelled to establish the fact of trespass at law, and then equity would grant an injunction to prevent multiplicity of suits.

EQUITY JURISDICTION — ENFORCING PAROL GIFT OF LAND. — Equity will enforce specific performance of a parol gift of land, where it is accompanied by possession and valuable improvements on the part of the donee relying on the promise of the donor. *Dawson v. McFaddin*, 34 N.W. Rep. 338 (Neb.).

EQUITY JURISDICTION — RESTRAINING CRIMINAL PROSECUTION. — An action had been commenced in a State Court to have a brewery abated as a nuisance.

The case was removed to the Circuit Court. While it was there pending, the defendant applied to the same Court for an injunction, alleging that numerous prosecutions were being brought against him for separate sales of beer, and that his business would be destroyed and his property rendered valueless if they were allowed to proceed. The application was refused. "Courts of equity, therefore, deal only with civil and property rights. They have no jurisdiction to give relief in criminal cases, and they will not, therefore, interfere by injunction with the course of criminal justice." *Suess v. Noble*, 31 Fed. Rep. 855.

**EQUITY JURISDICTION—SPECIFIC PERFORMANCE.**—Mortgagees were selling property at auction under foreclosure. An agent of the mortgagor put in a bid to run the price up, with no intention of completing the purchase. The defendant was thus induced to raise his former bid. But, on learning the facts, he refused to complete, on the ground that his bid had been obtained by fraud. *Held*—That specific performance must be given, as the vendors knew nothing of the fraud. *Union Bank of London v. Munster*, 84 L. T. 8.

**HOMICIDE—MORAL INSANITY—INTOXICATION.**—An irresistible impulse to do an act known to be wrong and punishable is no defence. Nor is voluntary intoxication a defence, but evidence of it is admissible when the question is as to intent. *State v. Moury*, 15 Pac. Rep. 282 (Kan.).

A note collects recent cases on the test of criminal responsibility, and on the burden of proof when insanity is set up as a defence.

**JUDICIAL NOTICE.**—The plaintiff was convicted of a burglary alleged to have been committed in Cook county. The proof showed simply that it was committed in Chicago. *Held*—The Court will take judicial notice that Chicago is in Cook county. *Sullivan v. People*, 13 N. E. Rep. 248 (Ill.).

**LETTERS—RIGHT OF RECEIVER TO SELL.**—The receiver of a letter has only a qualified property in it, the general property remaining in the writer. This applies to letters other than those valued as literary compositions. Therefore the receiver cannot sell without the consent of the writer. *Rice v. Williams*, 20 Chicago Legal News, 53; 32 Fed. Rep. 437.

**MORTGAGE—SUBSEQUENT LEASE BY A MORTGAGOR.**—A mortgagor let a house at a yearly rent, payable quarterly. After one quarter's rent had been paid to him, the mortgagee gave notice to the tenant to pay the rent to him in the future. The mortgage was transferred, and notice of the transfer was given to the tenant. The receiver of rents due to the mortgagor applied to the tenant for the next quarter's rent, but he paid it instead to the transferees of the mortgage. It was held that the proper inference from the tenant's remaining in possession after notice to pay rent to the mortgagee was that he assented to become his tenant, and therefore he was justified in paying rent to the assignees of the mortgage, and need not pay it to the receiver of the mortgagor. *Underhay v. Read*, 45 W. N. 188.

This appears to be a return to the thoroughly discredited doctrine of *Pope v. Biggs*, 9 B. & C. 245. Even if the inference were a necessary one, it would not follow that the lessee had ceased to be tenant to the mortgagor because he had become tenant to the mortgagee. Payment of rent to the latter is not a defence to an action by the former, but at most a counter-claim. The lessee is still tenant by estoppel to the mortgagor, under the old law. This case holds in effect that this relation was terminated by a *constructive* eviction.

**NEGLIGENCE, PRESUMPTION OF.**—The defendant operated a steam tow-boat, the boiler of which exploded, doing great injury to the plaintiff's boat. The tow-boat was not licensed under United States statutes requiring boilers to be examined by an inspector. *Held*—The defendant was liable on proof of the above facts without proof of negligence. *Van Orden v. Robinson*, 36 Alb. L. J. 403; 46 Hun, 567.

**PARTNERSHIP—ACCOMMODATION NOTE.**—The defendant's partner without authority gave a note by way of accommodation. The note came into the hands of a bank, and another was given in renewal of it, the bank being then aware that the original was given without authority. It did not appear that this was known when the bank first received the note, and for this reason recovery was

allowed. *Union Bank of Lower Canada v. Bulmer*, 10 Legal News, 361 (Supreme Court of Canada).

The original note being good against the firm, the renewal of it is partnership business.

**PLEDGE — DISCHARGE.** — A made a note payable to B or bearer, secured by a real mortgage. B delivered it before maturity to C as collateral security for a pre-existing debt of larger amount. A, not knowing of the transfer, paid the note in cotton to B, who had no authority to receive payment. B converted the cotton into money and remitted it in a check for a larger sum to C. C, in ignorance of how the money was obtained, credited it to B on his debt. A large balance being still due from B, C commenced statutory proceedings against A to foreclose the mortgage, to which A pleaded payment. *Held* — The debt from A to C was discharged. *Coleman v. Jenkins*, 3 S. E. Rep. 444 (Ga.).

The Court went on the ground that if A had paid C, instead of B, C would have been in exactly the position in which he now is, only he would have had to credit A as well as B. This would seem rather a moral than a legal reason why C should not prevail. When B received the cotton without authority, the legal title passed to him subject to an equity in favor of A. Had B paid this cotton on his own account to C, C would have taken the title free from all equities as a purchaser for value without notice, the value being the giving up *pro tanto* of his claim against B. That C could have retained the cotton, see *Baldwin v. Burrows*, 47 N. Y. 199; *Thatcher v. Craig*, 113 Mass. 291; *Pope v. Lowitz*, 14 Bradw. 96 (Ill.). The case of payment of money by B is even stronger, for C could have kept it if B had stolen it from A. C has the right to say, "Having no notice, I dealt with this money as B's own, and credited it in discharge of his obligation; I have never consented to discharge my security; it is as if B had defrauded A and paid me the money." A's obligation, at his peril, was to pay the note to the bearer, and he was guilty of gross negligence in not requiring his note from B. Under the plea of payment he was allowed to show an unauthorized payment to B, who commingled the proceeds in a larger sum, which he paid to C on his own account. If A's note was a perfect obligation at law, how could equity refuse to foreclose the mortgage securing it?

**PROMISSORY NOTE — ILLEGALITY — GAMBLING.** — Several persons were playing at dice for money. In the course of the game one of the players borrowed of another various sums, amounting in all to \$350. At the close of the game he gave his note for this sum. The lender did not win any of the money. *Held* — That he could enforce the note. *Corbin v. Wachhorst*, 15 Pac. Rep. 22 (Cal.).

This decision seems contrary to sound public policy. That the law is otherwise, save in New York, see *Greenhood on Public Policy*, 94. In *Hill v. Spear*, 50 N. H. 253, at p. 273, it is said, "Money loaned to a gambler for the purpose of being staked upon a pending game cannot be recovered." *Corbin v. Wachhorst* is not in accord with the more recent English cases, though the American decisions on the analogous cases of a sale made, or of work done, knowing that the property will be used for an illegal purpose, would generally go as far as this case. (Cases collected in 22 Alb. L. J. 405.) For an amusing statement of the modern English law of gaming promissory notes, see 21 Irish Law Times, 668.

**QUASI CONTRACT — USE AND OCCUPATION.** — A trespasser who uses land is not liable to the owner for use and occupation, there being no evidence of the relation of landlord and tenant between them. *Dixon v. Ahern*, 25 Cent. L. J. 344 (Nev.), and note with cases.

**RIGHT OF WAY — PRESCRIPTION.** — The lots owned by plaintiff and defendant were separated by a way, the fee in which remained in a former owner of both lots. Successive owners of each lot had used the way in common for more than forty years. The plaintiff brings trespass for interfering with his right of way. *Held* — two judges dissenting — that it will not lie, since the user proved is not exclusive. *Ellis v. Black*, 23 Canada Law Journal, 390 (Supreme Court of Canada).

**STATUTE OF LIMITATIONS — DEMURRER.** — When it appears on the face of a petition that the claim is barred by the Statute of Limitations, advantage may be taken of it by demurrer, on the ground that it does not state a good cause of action. *Merriam v. Miller*, 34 N. W. Rep. 625, and note (Neb.).



**TRESPASS — DAMAGES.** — The defendant, with notice of the plaintiff's claim to title, relying on his own supposed title, cut and carried away logs from the disputed premises. When the logs were at the mill a demand was made for them on the part of the plaintiff, and on refusal he brought this action. He was awarded the "stumpage" value of the timber, and appealed. The logs at the time of the demand were worth about twice the stump value. *Held* — The defendant having acted in good faith, the plaintiff can recover only actual damages, viz., the "stumpage" value. *Whitney v. Huntington*, 25 Cent. L. J. 349 (Minn.), and note. See *Isle Royale Mining Co. v. Hertin*, 39 Mich. 332 (also stated *supra*, p. 40).

**TRUST, DECLARATION OF — IMPERFECT GIFT.** — Clerke was trustee for Mrs. Hewitt, the plaintiff, and was instructed to pay off a mortgage upon her property with the trust-funds. Instead of doing so he appropriated them to his own use, but paid the interest on the mortgage regularly, and so kept the plaintiff in ignorance of his breach of trust. On his death there was found in his safe a policy of insurance on his life with an indorsement to Mrs. Hewitt on the back, and the following note to his executor: "Mr. Jones: Mr. Anderson holds a mortgage on Mrs. Hewitt's place for less than \$2,000. This policy is assigned to pay that mortgage off and cancel the same, as I am under obligations to do so. I had her money loaned out, and am bound to replace it. Alfred A. Clerke." *Held* — This was a sufficient declaration of trust. Judgment for plaintiff. *Hewitt v. The Provident Life Trust Co.*, Superior Court, Cincinnati, O., 18 Weekly Law Bulletin, 220.

If the assignment is capable of being construed as a declaration of trust by Clerke, the decision is clearly correct. But if the indorsement and words, "this policy is assigned," simply mean that he has done everything necessary to transfer it to Mrs. Hewitt except deliver it, and expects the executor to do that, — if, in other words, the intention was to assign and not to declare a trust, the decision cannot be supported. It seems difficult to find, from the language used, an intention to hold as trustee.

A transfer of possession is necessary to make a conveyance of a policy of insurance in this country. *Ames' Cases on Trusts*, p. 110, note.

A similar point was recently decided in Chancery Division, *Re Richards*, 57 L. T. Rep. 249. The testatrix signed a note, payable on demand to her servant, and handed it to her solicitor, telling him to give it to the servant if the latter should be in her service at her death. The servant, being in her service at the time of her death, claims the amount of the note from the estate. *Held* — That the solicitor was a trustee of the note; and payment was decreed.

If the solicitor were a trustee, he must have been such only of the piece of paper, not of the obligation, since that was payable to the servant. But the custody of a piece of paper with instructions to deliver it to a third party constitutes a simple case of bailment. There is no need of invoking the doctrine of a trust, even if it were possible from the language used, since the third party has an ample remedy as beneficiary of the contract of bailment. Apart from the grounds of the decision, it was plainly wrong on the authorities, for the reason that a promissory note delivered as a voluntary gift cannot be enforced.

Another case of trust is found in 5 S. W. Rep. 441, *Templeton v. Brown* (Tenn.). A husband gave his wife \$40,000. Being afterwards in need of money, he borrowed \$10,000 from her, and gave his promissory note. On her suing his administrator on the note, it was *Held* — That he, by the execution of the note, declared himself a trustee of the \$10,000.

The wife, probably, had an equitable right (see 3 DeG., J., & S. 672; 108 U. S. 66; 130 Mass. 407; 51 N. Y. 395; 8 N. J. L. Journal, 358); but that it was a trust is plainly not the case.

*Sterling v. Wilkinson*, 3 S. E. Rep. 533 (Va.), is a better case. A person, now deceased, gave bonds to the defendant, to be delivered, in case of his death, to the widow and children. A receipt for additional bonds stated that the defendant was to hold them in trust for the depositor's children. *Held* — That, on the intention gathered from all the circumstances, no trust was created, and, as the transaction was imperfect as a gift, from the fact that the testator had not parted with the control of the bonds, they were chargeable with the debts of the deceased.

**VOLUNTARY CONVEYANCE — MARRIAGE SETTLEMENT.** — Freeholds belonging to a widower were conveyed by a marriage settlement to his children by a former marriage. He afterwards mortgaged the same property, and it was sold under

the mortgage. The vendee objected to the title, but it was held that the settlement was voluntary, and the mortgage prevailed over it. *In re Cameron and Wells*, 45 W. N. 185.

*Price v. Jenkins*, 4 Ch. D. 483, was cited by counsel. It is directly in point, but was reversed in 5 Ch. D. 619, on another ground, and this question was left open. *Clarke v. Wright*, 6 H. & N. 849, which upheld a settlement on an illegitimate son of the woman, seems not to have been cited, but it was characterized in *Price v. Jenkins* as a case to be followed only when the circumstances are exactly similar.

WILL — CONDITION. — Land was devised in fee on condition that the legatee "take the name and bear the arms of Say." There was no gift over. The legatee entered into an agreement for the sale of the land. The purchaser objected to the title on the ground that the land would go to the testator's heir if the legatee ceased to "bear" the arms. *Held* — That the legatee, having taken the name and borne the arms, had fulfilled the condition, and could give a good title. *Re Farrar and Champion*, 84 L. T. 25.

WILL — VOID LIFE ESTATE. — A devise to A for life, remainder over to B, was void as to A by reason of her having witnessed the will. *Held* — That B was not advanced, but the life estate went to the heirs. *Elliot v. Brent*, 15 Wash. L. Rep. 754 (Sup. Court, D. C.). See *contra*, *Full v. Jacobs*, 3 Ch. D. 703.

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## REVIEWS.

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THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS, AS FOUND IN THE AMERICAN CASES. By Hampton L. Carson, of the Philadelphia bar; Text-book series, Vol. 1, No. 1. The Blackstone Publishing Company, Philadelphia, 1887, pp. 235.

This work is bound in the same volume with "Wright on Criminal Conspiracy," and, unlike the others of the same series, is not a reprint. Mr. Carson's work was originally intended, as he says, to illustrate Mr. Wright's text "by reference to the American cases in the form of notes;" but he found so much material that he concluded to shape it into a distinct hand-book for the lawyer in active practice.

In view of the recent wide-spread labor disturbances, Mr. Carson's section entitled, "Conspiracies Relating to the Rates of Wages — Strikes and Boycotts," pages 144 to 179, will not be found the least interesting in the book. His conclusions from the cases cited, many of which are very recent, including *The Old Dominion Steamship Co. v. McKenna*, and *State v. Glidden*, is briefly as follows: Workmen may lawfully combine for many purposes, such as the raising of their wages, the prevention of overcrowding in their trade, etc. "The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation, in order to secure their ends; or where their object be to impoverish third persons, or to extort money from their employers, or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment."

On the whole, Mr. Carson's book seems to live up to the preface in a satisfactory manner. Its merit is rather as a hand-book of the latest decisions in criminal conspiracy, than as a very learned or scientific treatise on the subject.

B. G. D.

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## CONFLICT OF LAWS AS APPLIED TO ASSIGN- MENTS FOR CREDITORS.

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WHEN a trader or a trading corporation becomes insolvent the common law of England and America permits the several creditors to obtain such advantage and preference as legal diligence may chance to give them, and authorizes the debtor to make such preferences among them as he pleases.

Bankrupt laws are intended to change all this, and to give to all creditors of equal rank an equal share in the debtor's property. Courts of Equity, though they cannot interfere with legal diligence or legal assignments, have borrowed the notion of equality, and will apply it whenever a case is fully under their control, as where an insolvent corporation is being wound up, or where creditors proceed in equity against equitable assets.

Not only in Courts of Equity but in the mercantile world it is now admitted to be both wise and just that all creditors should share alike the assets of an insolvent. In some of our States bankrupt laws have been passed, and in others laws regulating general assignments, all aiming, with more or less success, at this equality.

Notwithstanding this general *consensus* of opinion, it is impossible to attain equality among creditors if the debtor has property and owes debts in several States or countries, by reason of a cer-

tain principle of law which was adopted in this country when the conditions of business were very different from those now obtaining.

The several States of the United States are, in law, foreign to each other, and the effect in one State of bankruptcy of a debtor in another State or in a foreign country depends upon the doctrines of private international law as understood in the States in which the questions arise. The principle above referred to, which is the established law throughout the United States, is, that a decree in a foreign country or a sister State, by which the property of a bankrupt resident in such country or State has been taken from him and vested in trustees for his creditors, will not receive recognition in our Courts as against the attachments of creditors who are citizens of the *forum* of the attachment, even when the decree precedes the attachment.

A few decisions were supposed to go even farther, and to hold that a trustee thus appointed had no standing in our Courts; and that his title could not even prevail against that of the bankrupt himself. The case of *Abraham v. Plestoro*, 3 Wend. 538, was cited for the doctrine. But that decision has been explained to mean much less, and in the highest Court of the State where it was made (New York) a trustee in bankruptcy in England has lately recovered from the bankrupt himself, who happened to be in New York, funds which the bankrupt had collected from debtors of his firm residing there. *In re Waite*, 99 N.Y. 433.

Some *dicta* in *Booth v. Clark*, 17 How. 322, have been taken to mean that a receiver or assignee cannot sue in the Courts of a State other than that of his appointment. But no such point was decided; and it is important to observe that the receiver in that case was one appointed under a bill in equity for the benefit of a single creditor, and might be considered to be a mere officer of the Court appointing him. Receivers for the benefit of creditors generally under proceedings for foreclosure or winding up, and assignees under a State insolvent law, have repeatedly maintained actions which have passed the ordeal of the Supreme Court, and on that point no question can now be raised.

In England the law was laid down about a century since, and has always been adhered to, that the decree of a foreign Court of the debtor's domicile, vesting his property in trustees for creditors, transfers to them the personal property in England, in spite of

any legal diligence which English creditors or others may afterwards seek to exercise.

Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. 460, reasoned in favor of this doctrine, and tried to introduce it into our jurisprudence, but without success. Our Courts still hold that our creditors attaching here, though their actions are begun after the date of the foreign decree, have the better right.

The American doctrine is not founded on an avowed policy or principle that our own citizens should, in any event, have the right to the assets within our jurisdiction. If no creditor happens to be in a situation to attach the personal property, the foreign trustee may take it, and no injunction will be granted to restrain him at the suit of creditors here whose debts have not matured. If he does take it and remove it from the State, no action lies against him to recover it back for the benefit of our citizens. If a foreign creditor attaches first, though it be in the interest of the foreign trustee, our own citizens, afterwards attaching, are not given a priority. We merely say that we do not respect a foreign decree as against our own citizens, who have an opportunity to use the process of our Courts, whether our course seems consistent with the usual rules of international law or not. Thus Chief Justice Gibson says, in substance, in *Miliken v. Aughenbaugh*, 1 Penn. R. 117, 125, that our Courts do not consider that international comity requires us to interfere to prevent creditors who owe no allegiance to the foreign government from pursuing their remedies against any property which accident has subjected to their power. And Story, *Conf. Laws*, § 420, says: "The point hitherto has been a struggle for priority and preference between parties claiming against the bankrupt by opposing titles; the assignees claiming for the general creditors, and the attaching creditors for their several rights."

It is, therefore, not quite accurate to treat this point as one of conflict between the law of the foreign debtor's domicile and the law of the *situs* of his property here. We have no law of the *situs* giving preference to our creditors, but simply refuse to interfere and aid the foreign trustee against the legal diligence of our creditors who may have the good fortune to be able to attach or take in execution the effects here before the trustee has removed them.

A policy to satisfy our own creditors first out of the assets here

would be a straightforward and intelligible policy, though narrow and selfish. Such was the law at one time in Maryland, and possibly in some other States. Our motive is to aid our own creditors; but we do it, as it were, underhand, so that we have the discredit of a want of comity, and fail to reap its full advantages.

The working of our rule is sometimes very annoying. If an insolvent trading corporation, for instance, is being wound up by receivers in New York, for the equal benefit of all its creditors, precisely as such a corporation would be wound up in Massachusetts, and a debtor of the corporation is summoned as garnishee in Massachusetts, by a creditor of the corporation residing in Massachusetts, and answers that the receivers in New York have demanded payment of the debt or have begun an action for it against him, the Courts of Massachusetts will give precedence to their own attaching creditor. *Taylor v. Columbian Ins. Co.*, 14 Allen, 353. If the same debtor is sued by the receivers in New York, and answers that he is summoned as garnishee of the corporation in Massachusetts, the Courts of New York will decide that the receivers have the better title. *Osgood v. Maguire*, 61 N.Y. 524.

Thus an honest debtor is twice vexed and put to trouble and expense; and if the case in Massachusetts is finished first, and the judgment is satisfied, a preference is obtained by the attaching creditor, although the laws of both States, when dealing with their own insolvent corporations, insist upon equality among creditors, foreign and domestic.

The injustice of the American practice has been often admitted, and several judges have suggested that the subject might be regulated with foreign countries by treaty. Such treaties have been made between some of the nations of Europe.

In *Dawes v. Head*, 3 Pick. 128, the Supreme Court of Massachusetts, in the case of a deceased foreign insolvent who had left some property here, declared that the practice above referred to ought not to be extended, and that the true rule for distributing the estate here was to give to the creditors here their full and equal dividend, taking into account all the assets and all the debts, both here and elsewhere. This suggestion has been adopted by statute in several States and by decision in others.<sup>1</sup> In *Harrison*

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<sup>1</sup> See 4 Kent, Com. 434.

v. Sterry, 5 Cranch, 289, both rules were adopted ; that is to say, the attaching creditors were first satisfied, and the surplus was disposed of with due regard to all debts and all assets.

The reasons of policy and convenience which induced our Courts to refuse full operation to a foreign decree, apply with equal force to assignments by the debtor himself upon similar trusts. Most of our Courts give greater effect to the latter than to the former ; but if we admit, as we do, that a decree assigning movables is valid excepting against attachments, there is no sound reason for not making a similar exception to the operation of assignments in this country. The technical distinction, as usually given, is, that a decree does not operate by its own force (*proprio vigore*) in a foreign country, while an act of the party does so operate ; but this is merely restating the proposition that we give full effect to one mode of assignment and only an incomplete effect to the other, both being valid or invalid as we may choose to give them much or little effect by comity.

In some few States the law of comity is consistently administered, and an assignment by the party is only respected when it conforms to our notions of justice. But in most States, as we have said, an assignment of movables, made by the owner, and good at the place where it is made, is held good here, unless it contravenes some express statute or discriminates against our creditors as such.

Real estate, both in England and the United States, cannot pass by a foreign decree, but must be conveyed by deed according to the forms and methods established by the law of the *situs*. When these forms are observed, there is no rational distinction between a transfer of land and one of movables. It is, however, sometimes held that the trusts upon which land is conveyed, as well as the forms of conveyancing, must accord with the general policy of the law of the *situs*. It is undoubtedly true that if there is any positive law of the *situs*, it must govern ; but the better modern opinion is, that this applies to movables as well as to immovables. If no positive law intervenes, there is no sound distinction between assignments of one kind of property or another in regard to the trusts upon which it is to be held.

It results from the superior authority given to a deed of the debtor over a decree transferring his property, that an insolvent owning property in several States is forced to make an assignment,

though he and all his creditors whose wishes can be ascertained would prefer that he should become a bankrupt under the law of his State; because his assignment, promptly recorded, will prevent an attachment of real and personal estate held in one or more States not of his domicile, while a decree will not have this effect. Such an assignment is not as useful or as easily worked or as economical as one under a carefully drawn insolvent law like that of Massachusetts, and is less beneficial for the debtor and for his creditors than the decree, if only the latter would be given its due operation; but there is no option if the debtor would preserve equality among his creditors against a race of diligence among them.

It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

If there is inconvenience in proving debts in a foreign country, ancillary administration might be granted here, as is done upon the estate of a deceased person.

It is not so easy to see how this result is to be reached in actual practice. A general bankrupt law would necessarily establish equality in this country as between debtor and creditors in the States, and might contain an enactment for foreign insolvents owning property here, putting them on the footing of *Dawes v. Head* and *Harrison v. Sterry*, *minus* the attachments in the latter case; or, with foreign nations, we might have treaties, as has been suggested by many jurists impressed with the injustice and confusion of our present practice. It is not, however, our purpose in this article to recommend a general bankrupt law, but only to point out the state of this branch of private international law.

*John Lowell.*



## CRITICISMS UPON HENRY GEORGE, REVIEWED FROM THE STAND-POINT OF JUSTICE.

**M**R. GEORGE'S proposition for a fundamental amendment of the laws has two aspects. He proposes, first, to abolish all existing taxation and to raise the revenue needed for the expenses of government by a single tax upon the value of the land held by each land-owner, the tax not to exceed at any time the fair rental value of the land exclusive of distinguishable betterments. He proposes, secondly, after the first step shall have been taken and a firm foothold secured, to use the machinery of taxation to exact the entire economic rent of land, and to apply the surplus, above what may be required for the necessary expenses of government, to the common welfare, in ways to be devised. He assumes that economic rent, in the present state of this and of every civilized country, would largely exceed the amount required for necessary governmental expenses. This assumption, however, is not essential to his scheme. If the amount realized by his tax would not support the government, of course there would have to be taxes on other things, but the amount to be so raised would be less by the amount of the land-value tax.

Before this project could be embodied in a law, many important details would require careful adjustment ; but it is now in a form that is sufficiently definite for a discussion of the principles upon which it is urged, and for the formation of an intelligent opinion thereon. So far, however, for the most part, critics have concerned themselves with the non-essentials of the proposed innovation ; they have missed the vital point in George's reasoning. And this is true, as I venture to think, not merely of the strictures which one hears in casual conversation or reads in newspaper editorials. It is true also of the deliberate treatment which the subject has received at the hands of competent publicists, such as the Duke of Argyll<sup>1</sup> and Mr. W. H. Mallock<sup>2</sup> in England, and Gen. Francis A. Walker<sup>3</sup> and Professor W. T. Harris<sup>4</sup> here.

In this paper I propose, briefly and in outline, so that, if there

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<sup>1</sup> "The Prophet of San Francisco." *Nineteenth Century* for April, 1884.

<sup>2</sup> "Property and Progress." A reprint of several essays in the *Quarterly Review*.

<sup>3</sup> "Land and its Rent."

<sup>4</sup> "Henry George's Mistake about Land." *The Forum* for July, 1887 ; also, more fully in *Journal of Social Science*, No. XXII., p. 116, *et seq.*

be a fallacy or sophism, it may readily be detected, to set out the essential reasons for adopting George's plan, and to point out, with reference to the principal current criticisms upon his doctrines, wherein they fail to meet those reasons.

Why should land be singled out and its holder made to bear a burden from which the owners of other sorts of property are exempt?

This is the vital question. Unless the answers to it are seen clearly and in right perspective, any judgment that may be made upon their sufficiency is bound to be defective. George gives two answers. The first, which is founded on purely economic considerations, in effect is: because material progress, in a community where absolute private property in land is maintained by law, acts, by force of that fact, like a wedge thrust midway into a social structure, to raise a few, without effort or merit on their part, and to grind down the masses of men however meritorious they may be; and because property in land being qualified in the way proposed, poverty will be abolished for every man who is willing to work according to his ability. It is by focussing attention upon the argument from which this answer is drawn to the exclusion of another much simpler and very different answer that the able editors of influential journals confuse George with the German socialists, that Mallock<sup>1</sup> glibly dismisses George's plan as "monstrous," that Walker<sup>2</sup> declines with a sneer to consider George's extra-economic reasoning, and that the Duke of Argyll,<sup>3</sup> himself appealing to the very principles upon which, unperceived by him, the second answer is based, describes his summary of George's writings as a "reduction to iniquity," and does not hesitate to say that "the world has never seen such a Preacher of Unrighteousness as Mr. Henry George."

The second answer, in substance, is: because land is not rightfully the subject of absolute property, and because the injustice of allowing it to be so acquired and held, will be remedied by the exaction and application to common uses of economic rent.

So many fantastic schemes have been put forward in the name of man's natural rights that there is, undeniably, some excuse for the incredulity with which propositions purporting to have that

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<sup>1</sup> "Property and Progress," p. 7.

<sup>2</sup> "Land and its Rent," pp. 141-2.

<sup>3</sup> See the pamphlet "Property in Land," containing a reprint of the Duke of Argyll's Essay and of Mr. George's reply.

basis are frequently met. But a little reflection will be apt to lead to a universal admission that the standard of right to which George appeals is valid. Little children in their play vaguely perceive and roughly act upon it in adjudging some of their fellows fair and others unfair. Our conduct in matters outside the domain of positive law, in a social club, for instance, is governed by it. In desperate emergencies, as at Cape Sabine, we unflinchingly exact the forfeiture of life itself from the man who will not conform to it. By its light, as by a beacon, our courts steer in construing constitutions and statutes, and in modifying the traditions of the common law to meet changed conditions. By that standard and no other the people of the United States of America are guided when the question is of breaking the ties of government, of establishing a new government, of making or amending constitutions, of framing statutes. I say, that in all such matters we are dominated by our natural conception of right; it is at least true that when the question is put point-blank, and must be answered categorically, we confess that we ought to be.

George's notion of natural rights differs in no way from the commonly accepted notion. He perceives the natural differences among men in mental, physical, and moral qualities, and he accepts such differences as facts without accusing God or nature of injustice in so ordering them. But when the question is of the relations of human beings among themselves, he says (and who does not agree with him?) that each, *as against all others, and so far as interference with him by them is concerned*, is entitled to himself, to his life, to his liberty, to the fruits of his exertions, to the pursuit of happiness, subject only to the equal correlative rights of every other human being. Nor is he peculiar in his general idea of the functions of government and the proper scope of positive law. In his view the primary function of government is the establishment of justice by securing to all the human beings within its jurisdiction their natural rights; and it is a perversion and abuse of government if it perform other functions otherwise than in subordination to that primary function, or if it make and enforce laws which abridge or deny those natural rights.<sup>1</sup>

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<sup>1</sup> It is important to emphasize the fact that George's ultimate principles as to the rights of men and the functions of government are the same as those now generally accepted, for, the fact being so, there is evidently common ground for argument, and a fair prospect that argument will be fruitful of valuable results. The current notions

The rulings of the Supreme Court of the United States on the subject of the public health suggest an analogy which will help to such an understanding of George's views on land as is required for their intelligent refutation no less than for intelligently accepting them. It is now the settled law<sup>1</sup> that the governmental power to make laws for the protection of the public health is inalienable, the reason as stated by the court being that such power "is so in-

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are, I think, fully expressed in the following extract from Prof. W. G. Sumner's "What Social Classes Owe to Each Other," pp. 162-4: "Every honest citizen of a free state owes it to himself, to the community, and especially to those who are at once weak and wronged, to go to their assistance, and to help redress their wrongs. Whenever a law or social arrangement acts so as to injure any one, and that one the humblest, then there is a duty on those who are stronger, or who know better, to demand and fight for redress and correction. When generalized, this means that it is the duty of All-of-us (that is, the State) to establish justice for all, from the least to the greatest, and in all matters. This, however, is no new doctrine. It is only the old, true, and indisputable function of the State; and in working for a redress of wrongs and a correction of legislative abuses, we are only struggling to a fuller realization of it, — that is, working to improve civil government. We each owe it to the other to guarantee rights. . . . Rights should be equal because they pertain to chances, and all ought to have equal chances so far as chances are provided or limited by the action of society. This, however, will not produce equal results, but it is right just because it will produce unequal results — that is, results which shall be proportioned to the merits of individuals. We each owe it to the other to guarantee mutually the chance to earn, to possess, to learn, to marry, etc., etc., against any interference which would prevent the exercise of those rights by a person who wishes to prosecute and enjoy them in peace for the pursuit of happiness. If we generalize this, it means that All-of-us ought to guarantee rights to each of us. But our modern, free, constitutional states are constructed entirely on the notion of rights, and we regard them as performing their functions more and more perfectly according as they guarantee rights in consonance with the constantly corrected and expanded notions of rights from one generation to another." George's published writings show him to be in full accord with this formulation of principles by Professor Sumner. It is in the application of these principles to facts that he leaves the beaten track. For example, his argument for the abolition of the legal institution of absolute property in land may be thus stated: The institution should be abolished, because (on principle) "all ought to have equal chances so far as chances are provided or limited by the action of society," and because (as a fact) with that institution existing, it is impossible for all to have equal chances. Again, he advocates the assumption by government of businesses that are necessarily monopolistic, such as railroads and the telegraph, because, as a fact, that is the only way in which we can effectually guarantee each to the other equality of chances, the only way in which we can really "establish justice for all." Professor Sumner's way of expressing ultimate principles is somewhat unusual. For similar ideas stated in more familiar terms, see the dissenting opinions of Mr. Justice Field and Mr. Justice Bradley in the *Slaughter-House Cases*, 16 Wall. 36; the concurring opinions of the same judges in *Butchers' Union v. Crescent City Co.*, 111 U.S. 746; and the opinion of the court in *Yick Wo v. Hopkins*, 118 U.S. 356. See also the Declaration of Independence.

<sup>1</sup> *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746; *Slaughter-House Cases*, 16 Wall. 36.

dispensable to the public welfare that it cannot be bargained away by contract ;" that, under the laws at any time provided for the protection of the public health, individuals may acquire property rights (*e. g.*, the exclusive right within a designated area to keep a place for slaughtering animals and preparing their meat for market) which are unassailable, and must be respected by other individuals ; and that property so acquired is held *subject to the right of the legislature to qualify or destroy it at will according to its judgment of what the public interest requires, and without regard to investments that may have been made or calculations based on the action of a prior legislature, even though such action took the form of a contract.* In contrasting land with public health, it will be necessary to disregard whatever constitutional recognition there may be that property in land is precisely like property in buildings or chattels, and also to use the term "legislature" broadly so as to include the people themselves when performing the supreme legislative function of making or amending constitutions, as well as the particular bodies to whom legislative power under our system is delegated. Doing that, the contents of George's thesis on land may be described as follows, in terms suggested by the judicial rulings on public health : (1) The due regulation by law of the use of the land within the government's jurisdiction is indispensable to the public welfare, for so only can the natural rights of all the people be secured. (2) Hence government cannot deprive itself or be deprived of the power to regulate the use of land at any time and in any manner that is adapted to secure to all the people their natural rights ; *i. e.*, such power cannot in any manner be suspended or abdicated or otherwise alienated. (3) Under the laws that at any time exist individuals may acquire property in land, which must be respected by their fellows, and such property, according to its nature, as determined by existing law, they may use or abuse, sell, donate, or devise, substantially as they please. (4) But no property in land can be acquired except subject to the limitation that it may at any time be qualified or destroyed at the will of the legislature, expressed in general laws applying to all the land within the jurisdiction. Observe as to these four propositions, that they contain no intimation as to the body to which, in the distribution of governmental powers, the regulation of the land is or should be committed ; that is a separate question not necessary to be considered now. Observe also, that whether these

propositions are correct or not is a question which may be argued and decided precisely like the question of the constitutionality of a statute, if we take as a statement of the supreme law, that the primary function of government is to secure to all its people their natural rights. Observe also, that if the supreme law is so, and if these propositions are correctly deduced therefrom, no man now has any property in land which cannot rightfully be qualified or destroyed without compensation by general laws designed to regulate the use of land, though if absolute property in land is recognized in our existing constitutions our judges and congressmen and the members of our state representative legislatures are bound thereby, and only the people themselves, in whom all sovereign powers ultimately merge, could declare that result.

How, then, are conclusions so momentous reached? The heads of the argument are as follows: (1) Land is, literally, indispensable to life. "How long," asks George, "could the strongest and most resourceful human being maintain life in interplanetary space?" The land is man's foothold, his resting-place, his opportunity; the only source whence the materials which his faculties require to work upon can be extracted; the only part of space where nourishment can be obtained. The right to life, therefore, involves a right to land, title to which vests at birth and by the fact of birth in every human being; and such right, as against all other human beings, like the right to life, has no limit except such as the equal correlative rights of others impose. (2) Land varies in fertility, salubrity, accessibility, and generally in desirableness. Laws, therefore, securing to some men as absolute property the best parcels of land within the government's jurisdiction are unjust inasmuch as the natural right of other men to the best parcels is as good as and equal to that of the favored ones, and such other men are not compensated for the difference in desirableness between the best lands and such lands as are open to them. (3) The land within the jurisdiction of the government is limited in amount, and is, therefore, capable of full appropriation by some to the exclusion of others; and when this happens, as is now practically the case in the State of New York, in Massachusetts, in England, in Ireland, the dilemma currently attributed to the Marquis of Salisbury is presented by the laws to some men and not to others; some must pay rent to others or they must emigrate. This dilemma is forced upon some and not upon

all, and, therefore, either alternative is a substantial infringement of natural rights. If emigration is accepted, the non-landholder must leave the place where he wishes to be, where his relatives and his friends live, where his ancestors dwelt, and go to and abide in a country he does not wish to live in ; that is, his liberty (all others not being equally coerced) is in so far restricted. If, on the contrary, he prefers to yield to the demand for rent, he must surrender some portion of his property, and his natural right to what he has acquired by the exercise of the powers and faculties with which nature has endowed him (all others within the jurisdiction not being put by the laws in the same predicament) is in so far impaired. (4) The conclusion is, that absolute property in land as a legal institution is inconsistent with and destructive of the natural right to life, the natural right to liberty, the natural right to the fruits of one's exertions, and, as the natural right to the pursuit of happiness depends upon the enjoyment of these other rights, the institution is inconsistent with and destructive of that natural right also. And hence, also, it follows (unless it be not true that the main purpose of government is to secure to all its people their natural rights, and unless it be not true that the public welfare primarily depends upon those rights being secured) that the land is not the rightful subject of absolute property, but its use and occupancy must be regulated by law.

If we take a comprehensive view of the points just enumerated, it will be conceded probably that the only one that need be dwelt upon is the first. That the power to regulate the use of land must be regarded as an essential function of government if such regulation is the only way in which the natural rights of all can be secured, seems scarcely open to fair doubt. So as to the third point ; the Marquis of Salisbury's dilemma is unjust only if the laws upholding private property in land as we now have it are unjust, and those laws are unjust only if there be a natural right to land which they deny. And the second point, in the very form of its statement, depends for its validity upon the existence of such a right. The second, third, and fourth points are evidently mere corollaries of the first. That granted, they follow ; that denied, they also fall.

These, then, are the questions : Has every human being, as against others, a natural right to land ? and if so, is there any limit to such right except that prescribed by the equal rights of

other human beings? These questions involve nothing recondite. Their difficulty, if they have any, lies in their simplicity. Pretty much all that one man can do for another towards solving them is to present them clearly and ask, "What do you think?"

. In treating these questions, George argues little and *refines* not at all. In his various writings he presents his views in different forms, but always as though he considers what he says to be self-evident so soon as attention is fixed upon it. Natural rights, he thinks, spring from and are testified to by the natural facts of individual organization, — "the fact that each particular pair of hands obey a particular brain and are related to a particular stomach; the fact that each man is a definite, coherent, independent whole."<sup>1</sup> He declines argument with those who assert that all rights spring from the grant of the sovereign political power, and that none are natural, and he quotes the Declaration of Independence, the preamble to the Federal Constitution, and the French Declaration of Rights as true descriptions of natural rights and of the subordination of government thereto.<sup>2</sup> As to the right to land, he says (referring specifically to Ireland): "Since, then, all the Irish people have the same equal right to life, it follows that they must all have the same equal right to the land of Ireland. If they are all in Ireland by the same equal permission of nature, so that no one of them can justly set up a superior claim to life than any other one of them, so that all the rest of them could not justly say to any one of them, 'You have not the same right to live as we have; therefore we will pitch you out of Ireland into the sea,' then they must all have the same equal right to the elements which nature has provided for the sustaining of life, — to air, to water, and to land; for to deny the equal right to the elements necessary to the maintaining of life, is to deny the equal right to life. Any law that said, 'Certain babies have no right to the soil of Ireland; therefore they shall be thrown off the soil of Ireland,' would be precisely equivalent to a law that said, 'Certain babies have no right to live; therefore they shall be thrown into the sea.' And as no law or custom or agreement can justify the denial of the equal right to life, so no law or custom or agreement can justify the denial of the equal right to land. It therefore follows from the very fact of their existence that the right of each one of the people of

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<sup>1</sup> "Progress and Poverty," Book VII., chap. i.

<sup>2</sup> "Social Problems," chap. x.



Ireland to an equal share in the land of Ireland is equal and inalienable; that is to say, that the use and benefit of the land of Ireland belong rightfully to the whole people of Ireland; to each one as much as to every other; to no one more than to any other; not to some individuals to the exclusion of other individuals; not to one class to the exclusion of other classes; not to landlords, not to tenants, not to cultivators, but to the whole people. This right is irrefutable and indefeasible. It pertains to and springs from the fact of existence, the right to live. No law, no covenant, no agreement can bar it. One generation cannot stipulate away the rights of another generation. If the whole people of Ireland were to unite in bargaining away their right in the land, how could they justly bargain away the right of the child who the next moment is born? No one can bargain away what is not his; no one can stipulate away the rights of another. And if the new-born infant has an equal right to life, then has it an equal right to land. Its warrant, which comes direct from nature, and which sets aside all human laws and title-deeds, is the fact that it is born.”<sup>1</sup>

This simple deduction of a right to land belonging to every human being as against all other human beings becomes more forcible and convincing if placed in sharp contrast with the sources of the titles to land which the positive laws now uphold. “Consider for a moment [says George] the utter absurdity of the titles by which we permit to be gravely passed from John Doe to Richard Roe the right to exclusively possess the earth, giving absolute dominion as against all others. In California our land-titles go back to the Supreme Government of Mexico, who took from the Spanish King, who took from the Pope when he by a stroke of the pen divided lands yet to be discovered between the Spanish or Portuguese; or, if you please, they rest upon conquest. In the Eastern States they go back to treaties with Indians and grants from English kings; in Louisiana, to the Government of France; in Florida, to the Government of Spain; while in England they go back to the Norman conquerors. Everywhere not to a right which obliges, but to a force which compels. And when a title rests but on force, no complaint can be made when force annuls it. Whenever the people, having the power, choose to annul those titles, no objection can be made in the name of justice. There have existed men who had the power to hold or to give exclusive possession of

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<sup>1</sup> “The Land Question,” chap. v.

portions of the earth's surface, but when and where did there exist the human being who had the right?"<sup>1</sup>

Nor shall we find any ground for doubting the soundness of George's deduction if we place by the side of it the reasons which are offered in defence of the existing institution. Those reasons are summed up, very tersely, by Prof. W. G. Sumner, as follows:<sup>2</sup> "The reason for allowing private property in land is, that two men cannot eat the same loaf of bread. If A has taken a piece of land, and is at work getting his loaf out of it, B cannot use the same land at the same time for the same purpose. Priority of appropriation is the only title of right which can supersede the title of greater force." Force may be laid out of account altogether, for no one can base a title of right upon it alone without admitting that mere force, whether of ballots or of bullets, can to-day rightfully wipe out existing titles and confer others in their stead. Priority of occupation is a mere straw of barely sufficient weight to turn balanced scales; how little it counts against such considerations as George adduces will be seen if we suppose a man owning a farm to die intestate leaving a son, X, who, as heir-at-law, takes full possession of the farm; in a month or so a posthumous son, Y, is born; clearly X's prior occupation of the farm gives him no right to exclude Y from it. It is doubtless true, as Prof. Sumner says, that while one man is getting his loaf out of a piece of land another man cannot use the same land at the same time for the same purpose. The difficulty with this, as an explanation or justification of the legal institution of private property in land, is that it does not explain or justify. "Private property in land," as the phrase is used by Prof. Sumner, has a very different signification from what it has in the mouths of lawyers and judges. In his sense of the words there would be private property in land if George's plan were followed. But the existing legal institution means that one man and his heirs and assigns, without doing anything whatever, may perpetually exact a part of the loaves which other men by their labor get out of the land. It means the holding of land out of use in anticipation of increase of population and increased general need for land. It means that one man may own a thousand-fold more land than he can by possibility use, and may, if he please, exclude all others therefrom. It means the Irish

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<sup>1</sup> "Progress and Poverty," Book VII., chap. i.

<sup>2</sup> "Social Classes," etc., p. 61.

landlord, Mr. William Scully, owning now 75,000 acres of the richest land in Illinois.<sup>1</sup> It means the Maxwell Land Grant<sup>2</sup> embracing in a single title  $1,714,964\frac{9}{10}\frac{4}{10}$  acres of land. It means the half of England owned by some five thousand persons. It means Ireland. It means the crowded tenement-houses and the vacant lots of Manhattan Island. This reason of Prof. Sumner for allowing private property in land, as we now have it, is like that of the people in Lamb's fable who burned down houses in order to roast their pig.

Whoever reflects upon this subject, however, will be likely to reserve his opinion till he has compared land as a subject of absolute property with other things. Here George and his opponents start from the same point. They, not less strenuously than he, insist that property in material things is sacred because founded upon a natural right which the positive laws may recognize, protect, and secure, but which they do not create, and cannot rightfully impair or take away. Generically, all natural rights may be grouped in one phrase, — the right as against all others of each man, to himself, unlimited save by the equal correlative rights of others. A right to one's self, — the idea plainly connotes a right (as against and to the exclusion of others) to what one acquires by the exertion of his natural faculties, whether mental or physical; plainly also a right to enjoy what is so acquired in any way one pleases, to use it, to give it away, to will it away, to exchange it for something more desired (provided another can be found willing to join in the exchange), and to hold what is received on exchange by its original title; and also a right in donee, legatee, and vendee to hold what they receive; and this is what is signified by the word *property*, whatever material thing it is applied to. Now, land can be acquired by the exercise of one's natural faculties as really and effectually as can any other physical thing, *e.g.*, a marble statue; for possession can be taken of it, the trees on it can be felled, the roots dug up, the weeds destroyed, the moisture drained off, the stones removed, the soil made mellow by the plough and rich with manure, — acts essentially similar to the quarrying of the marble and the chiselling of it into form. In neither case is any *matter* created, that being beyond man's power to do. In both cases possession is taken and *form* is changed by brain-directed

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<sup>1</sup> George, "Protection or Free Trade," p. 129.

<sup>2</sup> Maxwell Land Grant Case, 121 U.S. 325.

labor, and nothing else is done or happens. Between the two series of acts there is no difference whatever, save in the quantity of matter appropriated ; and that difference, enormous though it be, may not in fact be relatively greater than exists, as to quantity of matter appropriated, between the same statue and an animalcule which a microscopist has caught and caged, and stored in his cabinet. George's opponents, seeing this, assert that there is no valid basis for distinguishing between the animalcule, the statue, and the land as subjects of property ; the counter argument (they say) must necessarily be unsound, or it opens wide the door to communism. But do they not overlook something ?

One consideration, at least, is lost sight of, which is, that the deduction of a right to land from the right to life is quite as simple and quite as obvious as the deduction from the right to one's self of a right to hold and enjoy what one can by the exercise of his faculties. If there really be a conflict between the latter right and the former, the latter should certainly yield far enough at least to allow the maintenance of life. It may be said with truth, however, that this consideration of itself makes no greater concession than that necessary ; and we must look farther.

If we add a human being to the list of typical things which we have taken for illustration, we shall be certain that some essential consideration is ignored by those who argue that because by the exertion of mind and muscle the land, the animalcule, and the marble statue can be, and are in fact, reduced to possession, therefore no distinction is to be made between them, and all are to be deemed rightful subjects of property ; for men can make slaves of their fellow-men, and they have done so frequently, with the exertion of considerable mental and much physical force. Yet it is certain that human beings are not rightfully the subjects of property.

The thing forgotten is this : the natural rights are not absolute, but as to every man are limited by the corresponding rights of other men. This is the only qualification, and it is not easy always to keep it in sight ; but it is unquestionably a real and a most important one. By virtue of it a man alone upon a prairie may rightfully do pretty much everything that it is within his natural powers to do, while the same man in a crowded church or theatre is practically restricted to keeping his eyes and ears open. With this qualification before the mind, the reason is plain for distin-

guishing human beings from other things as subjects of property, for one cannot be the slave of another unless his rights are subordinated to those of that other; but in fact his rights and those of the other are equal. There is a distinction between land and other material things which is based upon the same qualification. Consider the natural right which gives sanctity to property in material things, viz., the right to acquire things by the exertion of one's mental or physical powers. *The exertion of one's natural powers* is evidently the central idea, and if we bring together that idea and the qualification upon all natural rights, we shall see that a material thing is not rightfully the subject of absolute property if the appropriation of it by the exertion of one man's natural powers interferes with the equal right of other men to exert their natural powers.

The appropriation of land does so interfere. To test the principle, it will be proper to take for illustration a community like New York or Massachusetts, whose laws maintain private property in land, and in which all the land has been fenced in, or substantially so; for such communities are numerous, and, as population increases, will become more numerous. In such a community, obviously, a landless man cannot do anything *individually*. He cannot obtain for himself food, or clothing, or shelter, or fire; he is dependent upon other men for such alms or for such employment as they are willing to give him; he cannot by any exercise of his faculties legally compel other men to give him either alms or employment. Unaided by other men he is pretty much as powerless to exert the faculties which nature has given him as though he were in the space between the stars. The reason why he is thus worse off than his fellows, the sole reason, is the fact that he is, and they are not, shut out from the land which nature gave to men to exert their faculties upon. He can, to be sure, exert his faculties to take himself beyond the pale which the laws have drawn around the land; but the pressure upon him to do that (being caused by other men having been allowed to appropriate and hold all the land of that community) is in itself a great interference with his equal right to exert his natural faculties.

The appropriation of things other than land, such as brute animals, grain, timber, minerals, and generally the raw materials, of which all the commodities which men need or desire are made, does not so interfere; for there is no limit, or no known limit,

to the supply of things of this class which men by labor can acquire, if the land, which is the source of supply, be not monopolized. By concentrated effort particular species of the class may be temporarily exhausted, but only temporarily, and not all species at the same time. Moreover, it is beyond human power to separate permanently from the general stock the *matter* of which things of this class are composed. Consider, the water which you dip from a spring is not lost or destroyed: sooner or later it evaporates, or, if you drink it, it leaves your body in forms which you are constituted by nature to loathe and reject, and you would not keep it if you could. So it is generally. No form in which nature presents matter, no form which men by their labor give to matter, is stable; even iron rusts and gold abrades; and when the form changes the matter escapes. Light, heat, winds, rain, frost, moths, worms, and other forces are pulling down as fast as the same and other natural forces, including those of man, are building up. Human powers can dam or turn the stream of change long enough to satisfy human wants, and not much longer. In short, though one man or many take what they can of things of this class, and keep what they take as long as they can, the equal right of other men to exert their faculties in the same manner is not thereby appreciably, if at all, interfered with.

The fact that the supply of material things which are adapted to the satisfaction of human wants is practically unlimited, is the sole justification for permitting them to be acquired and held without restriction. If the supply were limited, there would have to be restriction. Do we not all concede this in unusual cases when locally or temporarily the supply is short, as in a shipwreck or polar expedition? On the other hand, the fact that the land, being the source of all things that minister to human wants, is strictly limited in quantity, and varies greatly in desirableness, is itself a sufficient reason for asserting that it cannot rightfully be appropriated absolutely and in perpetuity.

It may be said (and it is surprising to find so acute a man as Mr. Mallock<sup>1</sup> perplexed by the thought) that nature knows nothing of "countries," "states," "communities," and "governments;" that the phrases "right to life" and "right to land" express relations which each man bears to the whole human race, and not to the people of a particular country or under a particular

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<sup>1</sup> "Poverty and Progress," pp. 111-126.

government; and that every man may be admitted to have a right to live somewhere and to some land without admitting that he has a right to live here or to the land of this country. No one who really saw and believed in the rights to life and land, and felt their immense significance, could say such a thing as that. Let us see: Take another natural right, which is deeply and truly believed in, and whose value and weight are perceived, — liberty, for instance. That right, too, is a relation which each man bears to all the rest of the race; that, too, in logical, if not in chronological order, precedes governments and states; but who ventures to risk his reputation for intelligence and sound judgment by denying that one is justified in complaining, nay, ultimately in rebelling, if the laws of the State of which he is a citizen deny him his natural right to liberty or fail to secure it to him as fully as circumstances at any time permit, and as fully at all times as they secure it to any other citizen of that State? If there be natural rights to life and land (and whether there are or not depends upon other considerations than the one now noticed) they must be dealt with by governments and states as the natural right to liberty is dealt with — must they not? There are no laws of the world which uphold private ownership of land any more than there are universal laws which maintain slavery or peonage. The institution in either case exists by force of the laws of the particular State within whose jurisdiction the land or the men affected by it are. Are the people of such a State any the less entitled, among themselves, one as against another, to be made secure in their natural rights by its laws, because there is no federation of nations, no sovereign government over the world, nor other practicable way of securing natural rights universally?

What precedes is all that can be given here of the argument offered to show that unrestricted private ownership of land as a legal institution involves a wrong which a government established to secure the natural rights of its people is bound to remedy. Observe that no reference, even by implication, has been made to the *value* of land. It is of much importance to exclude the idea of value from that part of the case, or to refer to it merely as a test for determining whether the possibility of injustice which absolute property in land necessarily involves has become actual injustice in any given community at any given time. For, unless one is cautious, it will shunt the mind to a wrong track. The argument for

the land-value tax is very apt to assume the form, and, if one may judge from current criticism, is quite generally understood to have the form, that because the value of land increases without effort on the part of the landholder as the community grows, therefore the community has earned such value, and may justly take it for common purposes. In that form the argument is fallacious beyond question. The value of land is its relation as to exchange to the other things which men desire. How can such a relation give rise to an obligation to pay money? Chattels fluctuate in value as well as the land, and for similar causes, increase being without merit as decrease is without fault on the part of their owner; and for this one need look no farther than to the daily quotations of corporate stocks, though other illustrations without number might be given. The truth is that a claim upon the value of land can be substantiated only by first successfully impeaching the title of its occupant. Grant that the land is his property, and necessarily he is entitled to it at any particular time, that is, he has a right to exchange it at that time for other things, if he will and if he can, and it is nobody's business whether he receives for it upon exchange many other things or few, much money or little; if he actually make an exchange, no other person, not even the State, as representative of all the rest of the community, can thereby acquire a right to take toll out of what he receives; still less can a right to exact money arise, because he might have made an exchange if he had wished to. But if the land is not his, if others have as good a right to it as he has, and he is suffered to have the exclusive occupancy and use of it, then he ought in justice to make compensation to such others, and the question is, how much?

Land has no value when and where equally desirable land can be had by every man who wants it. But land varies greatly in fertility, accessibility, and, generally, in desirableness. Hence, if many want it they will pay money to get the better quality rather than put up with the poorer quality. They can afford to do so up to a sum which, subtracted from what they can make from the better land, leaves a remainder equal to the gross return they would receive for the same expenditure if they took the poorer land without paying anything. The sum that can thus be paid measures the value of the better land. When all accessible land is taken up, and, through increase of population or otherwise, more is wanted, then all land



has a value which will go on increasing as population and the demand due thereto increases ; and to such increase there appears to be no limit save that those who want land must retain enough of what they have or earn barely to keep soul and body together. Hence, it follows that the value of land in any community at any given time measures both the natural differences in the quality or desirableness of land and also the need of the people of the community generally for land. If now we annually exact from each occupant of land a sum equal to what such land alone, irrespective of its improvements, would rent for, and if we divide annually the fund thus raised equally among all the people of the State, or apply it to the use of all, is it not evident that all the people will stand on equal terms, or substantially so, with reference to the land ? And if that is a result which justice requires us to bring about if possible, why are we not bound to make the exaction ?

The fact that land has a value which is unearned by the occupant is no ground at all for exacting such value from him if the land is really his. But if it is not his, the fact that its value measures natural differences and the general need of the people for land enables us to do with great simplicity and with reasonable approximation to accuracy what otherwise (so far as now appears) there would be no practicable way of doing at all.

Such, in outline, is the argument based upon the principles of justice as distinguished from the principles of political economy, for the radical change of the positive laws which George advocates. It is next in order to test the strength of this argument by a general consideration of the objections that so far have been made to the proposed change.

Many objections are nothing more than evil consequences, which are anticipated if the change be made. In strictness, such considerations are irrelevant. Without attempting in any degree to lift the veil of the future, we can determine whether, according to admitted principles, George's proposition is just or not ; if it is just, that itself is a sufficient reason for adopting it ; and we may confidently leave the future to take care of itself. Still, before dismissing the consequences of the innovation in this way, it is natural that we should try to find out as well as we can what they are likely to be, and it is material to do so for the purpose of ascertaining whether we can discern from that point of view

any flaw in the deductive reasoning which otherwise would escape observation.

Whatever else may happen, one beneficial result seems certain. Much land which is now held for the probable future rise in value, but is unused and unimproved or nearly so, will be laid open to all who wish to use land. What the speculative element in the present market value of land (*i.e.*, the element due to the probability of increased demand in the future) amounts to, there are no data for precisely determining. But the fact that nearly the whole of our vast country has been already appropriated, and is now in the hands of private owners, so that a landless man may go from the Atlantic Ocean to far beyond the Mississippi River, and from the Pacific to the great mountains, without finding a place where he can legally dig a hole in the ground for shelter or build a fire of sticks for warmth; the further fact that by very much the larger part of the immense area so appropriated (relatively to its capacity and judged by the standard of cultivation which exists in other parts of the world) is unused or but slightly used; and the further facts that come within our individual observation and experience, — justify the inference that the speculative element in the present value of land must be very great. Whatever that element really amounts to, the proposed tax, if adopted, will wipe it out completely. Land will have no value save what is due to difference in natural qualities and general desirableness. No man will hold more land than then has value than is actually required for his purposes, and the pressure upon him will be towards improving what he holds to the utmost. No man will hold land which he cannot or does not wish to use; for if it is better than other land in use he must pay a tax measuring the difference in quality, for which he will receive no return; and if it is no better than the poorest other land in use there would be no motive for holding it, but rather a motive against holding by reason of the liability at all times that somebody wishing to use land may select that particular land, which would show that it had then become valuable, and be followed by the tax-gatherer's claim. In brief, a very great body of land would become substantially free, and all the people of this country would stand, so far as abundance of natural opportunities is concerned, where their predecessors stood sixty or eighty years ago. Now, let any one put that result clearly before his mind and (waiving for the moment the justice or injustice of the means by which it is

to be brought about) say whether or not it is a state of things very greatly to be desired. Can any other than an affirmative answer be given? Furthermore, the annihilation of the speculative element of value is likely to have a particular beneficial effect in and near large cities, where now the density of population presents a great and terrible and threatening problem before which hitherto all the wisest and most humane of men have stood gasping and helpless. The importance of that problem may be judged of by those who will take the trouble to read the Rev. James O. S. Huntington's recent paper on *Tenement-House Morality*.<sup>1</sup> With a great population eager for better quarters (a population now so crowded in parts of New York City that on the average families of five persons occupy but three rooms, and 290,000 people find "homes" upon a single square mile of land) capitalists could make few better investments than by putting up comfortable houses for rent on vacant city and suburban lots, if from the value of such lots the speculative element were excluded. Houses would compete for men instead of men cutting each other's throats, as now, in the competition for houses.

Another result of the change that seems certain is that the burden of taxation upon productive industry would be materially lightened. Here also it is impossible to measure the amount of relief which would be given, for no statistics have been compiled with that object in view. The estimates of Professor Harris,<sup>2</sup> based on the census, have in them a good deal of guess-work, but they will answer for present purposes. Taking his figures,<sup>3</sup> the taxes now annually exacted for the support of the government are more than ten per cent. of the wealth annually produced. Such taxes fall very lightly upon land values, being drawn chiefly from commodities and from houses and other real-estate improvements. Being so large they must seriously impede the production of houses, commodities, etc. If such taxes could be completely abolished, is it not probable that the building of houses, the making of commodities, and industry generally would be greatly stimulated? According to Professor Harris' estimates a land-value tax at four

<sup>1</sup> *The Forum*, for July, 1887.

<sup>2</sup> "Henry George's Mistake about Land." *The Forum*, for July, 1887.

<sup>3</sup> They are: —

Wealth annually produced . . . . .	7,300 millions.
Annual taxes (National, State, County, Township, and District),	800 millions.
Aggregate of Land Values (improvements excluded) . . .	10,000 millions.

per cent. would yield not more than fifty per cent. of what is now raised. One-half of the present taxes taken from productive industry and put upon land values, where the tax could not in any manner affect production, would doubtless have an important stimulative effect. Professor Harris, however, in his estimates makes no deduction for the annihilation by the enactment of the new tax laws of the speculative element in land values; so that the amount that (according to his figures) could be taken off from the present objects of taxation would be much less than fifty per cent. Suppose it were but twenty per cent., would there not still be a substantial beneficial effect upon industry?

The advocates of George's plan believe that many other advantages would follow, the chief of which is the abolition of poverty for all who will work.<sup>1</sup> It is enough to mention these only in this place.

What, now, is offered upon the other side? The disturbance and readjustment of investments would be proper to be considered in determining upon the most judicious method of bringing the change about; but, being temporary merely, they may be disregarded for all other purposes. So, also, we may pass over the effect of the destruction of the speculative element in land values; such destruction cannot affect the land itself, which will remain as useful in all respects as now.

It is claimed that George's plan involves a great extension of the ordinary functions of government, which would be evil. This claim seems to rest on the floating general notions and theories which are summed up in the words *laissez faire*. It is not necessary now to discuss the soundness or the limits of the principle of *laissez faire*, or how far it can properly be invoked when the ques-

<sup>1</sup> In a series of articles on "Land, Labor, and Taxation," by Prof. R. T. Ely, of Johns Hopkins University, published in *The Independent* (Dec., 1887), George's plan was criticised as inadequate to accomplish all that is claimed for it. To this criticism George replied in his weekly journal, *The Standard* (Dec. 31, 1887), and pointed out, more clearly than he has elsewhere done, his reasons for supposing that the startling result stated in the text would follow. While Professor Ely denies that George's reasons for this conclusion are sufficient, it is easy to infer that, in his opinion, many very beneficial results would reasonably be anticipated; but, like most professional economists, he balks at the question of justice. The discoveries of the economists as to the nature of rent lie at the base of George's plan. With this acknowledgment I beg to be permitted to suggest that the economists would do well to drop the question of justice, stick to their proper functions, and tell us frankly and distinctly, with reasons, what the economic effects of George's plan, if adopted, would be. I conceive that *as economists* they have nothing to do with the question of justice. That question belongs to jurisprudence.

tion is of paying to a man or expending for his benefit money, *which is his of right*; that is, when the question is of "establishing justice," for George's plan does not necessarily involve any immediate extension of the present functions of government. If there can be any reliance whatever on the census and Professor Harris' calculations, the aggregate of present land values, deducting nothing for the destruction of the speculative element, would not yield a tax equal to one-half the necessary expenses of government; and making that deduction the proceeds of the tax would very likely not equal one-quarter of those expenses. Population must greatly increase, therefore, and many years pass before any question of what to do with a surplus can arise. Till then the advantage to the people of the new tax would lie partly in the weight of other taxes being lessened, but chiefly in the opening up of natural opportunities. On the other hand, supposing the census and Professor Harris to be in error, if a surplus over the necessary expenses of government were at once to arise, it is arguable that the government would better throw it into the sea or make an annual bonfire of it than leave it to be a bounty, as it is now, upon the locking up of land. It would be open to the advocates of *laissez faire* to take that view, if they choose, and still to accept a substantial part of George's plan.

It is said that the plan logically leads to socialism, and that if it be adopted socialism will be the inevitable result. Those who say this, like the socialists themselves, make no distinction between land on one hand and the fixed capital, tools, and instruments of production on the other, which the socialists would have the state take to itself. But if there be a valid distinction between land and these other things as subjects of property, the dread of socialism is groundless; and that there is such a distinction George tries to show. Hence this objection is out of place so long as the reasons for the distinction are not met and overthrown. We have always been socialistic to some extent, and apparently always must be so, more or less. We have the Erie Canal, the Mississippi River improvement, public education, the protective tariff, and the post-office, all of which are socialistic; and yet we have not socialism. And we never shall have socialism so long as we hold fast to the principle that it is the natural right of every man to hold and enjoy whatever he can acquire without infringing upon the corresponding right of other men.

It is anticipated by some of George's critics, who, however, can have taken little pains to understand his plan, that it necessitates the sacrifice of the many great advantages which undoubtedly go with the system of private land-ownership. That system as we have it took definite form about two centuries ago, when the last strong chain of feudalism was broken. Its establishment then marked a distinct advance in the development of the principle of personal liberty. Since that time it has been associated with many political and material improvements upon which all people of Anglo-Saxon lineage greatly pride themselves. Under it individuality and personal independence have been fostered. The security of possession, which is an element of it, exerts a powerful influence towards the making of lasting improvements and towards thorough cultivation of the soil. Other advantages of the system might be specified and admitted. But under George's plan houses and other improvements will be as secure as now. Individuality and personal independence will be promoted even more than now, for the land will be open to every man as a resource when all other resources fail. The plan threatens nothing that is good in the present system. Enumerate the present system's advantages, label them, tell them over one by one, and then point out any one that will not also exist if George's plan goes into effect. The matter may be tested thus: At present the tax on real estate falls in some small measure, say  $\frac{1}{4}$  per cent., on the land value, and yet we have all the advantages of private ownership of land; now suppose the tax to be taken off the houses and other improvements, and that, instead of the  $\frac{1}{4}$  per cent. which now falls on land values, an amount equal to 4 per cent. be levied; can any reason be given why we should not continue to have all that is advantageous in the present system?

Finally, it is said that the proposed tax would "ruin the farmers." The farmers for the most part are the descendants of the men who cleared this country of its forests, dug up the roots, piled the stones in strong walls, made the roads, and occasionally gave some attention to the savages while they were doing these other things. Is it the children of such man who are to be ruined? How are they to be ruined? Is it by having the land again free and open before them almost as their fathers had it? Surely they who say *ruin* do not measure their words; they must mean that the farmers will be "sort of" ruined. Let us consider

what truth there is in the prophecy so modified. The destruction of the speculative element in the value of land cannot hurt the farmers as a class. The farmers do not hold their land, as they do their corn and potatoes, for sale. They hold it to use; and it will be every whit as useful when the speculative element of its present value is wiped out. Only such farmers as desire to sell their farms run any risk, and even then only if their purpose is to invest the proceeds otherwise than in land; for if they wish to buy another farm they will find its price has fallen proportionally. How many farmers are likely to wish to sell their farms and invest the proceeds otherwise than in land? Are there more than one in a thousand? As to the burden upon the farmers of the tax on normal land values (*i.e.*, the value due solely to differences in fertility, situation, and generally in desirableness) it should be remembered that by reason of cheap transportation, distance from market, so far at least as the great farming staples are concerned, is now in this country a very small factor in the value of land. It is said that the produce of Iowa farmers competes on favorable terms in the Eastern markets with the produce of Eastern farms grown three miles or more from a railroad station. So that the normal value of agricultural land will depend almost entirely upon differences in fertility and differences in situation so far as situation affects the production of garden products, and so far as one situation may be more desirable than another for residence. Now, these differences are not very large so far as the land which the needs of the present population require to be cultivated is concerned. Hence for a long time, till population shall have greatly increased and recourse shall so be made necessary to much poorer lands than are now in use, the normal value of agricultural lands would be small and the tax would be small. Moreover, whatever the tax may amount to, there will be an offset against it in that present taxes upon houses and other improvements and upon clothing, tools, and other commodities which farmers do not produce, but have to buy, will be abolished or considerably reduced.

So much for the consequences. What will happen no man can foresee with certainty, but, so far as probability goes, there appears to be no reason why we should flinch from pronouncing the judgment upon the justice of George's plan which the argument would lead us to if consequences were left out of account altogether. We will now turn to objections of another sort.

Of all objections the one supported by the greatest weight of authority, and most confidently relied on, is that the change cannot justly be made without compensating present landholders. This objection, because it is free from timorous forebodings and appeals bravely to justice, deserves respectful and anxious consideration ; yet it is difficult to express it in full without at the same time suggesting the obvious answer to it. If the landholder be supposed to say, "The land is my property, just as my coat or my house is my property ; manifestly you cannot take it or damage it without being bound to compensate me," the obvious answer is, "Of course ; but why talk of compensation ? If the land is your property in the same unqualified sense that your coat or your house is, that fact alone makes an end of George." If it be said, "Admitting all that George claims ; admitting that I have no better right to this land than all the rest of the people, yet I have always honestly thought that the land belonged to me exclusively ; and upon the *bona fide* belief that that was so I have laid out much money and have labored the best part of my lifetime," the obvious answer is, "You admit that the land is not yours. Why should others be kept out of their rights because of what you *supposed* ? If another man had your horse and you demanded it, what would you think of him if he made such a claim as you do now ? How long would his protestations of honesty and good faith, even though you fully believed them, keep you from having the law of him, if he did not give up the horse or pay you its value ?" If it be said, "Both the nation and the state by their agents have encouraged the people to buy land, and they have in that way derived great benefits ; the nation by the federal constitution and the state by its constitution and statutes said to me that land could be acquired as absolute property ; I believed those representations ; I had no reason to suppose they were not true ; I bought this land relying upon them ; the nation and the state cannot now in common decency, to say nothing of justice, treat this land otherwise than as my absolute property ; their mouth is shut by their own words," the obvious answer is, "Assuming that you are right as to those representations being made, the same reasoning which shows that every man has a natural right to land, limited only by the equal right of other men, and that such right can be secured only by the government retaining the power to regulate the use of land so as to give all the people equal natural opportunities and keep them equal —



the same argument which shows this shows also that the men who made the constitutions and statutes which you refer to could not rightfully otherwise declare, and that they could not in any manner effectually suspend or alienate that power of regulation ; hence the men who, as you say, assumed in the name of the government to declare differently, exceeded their authority (as did that Louisiana legislature which attempted by contract to shave down the State's sovereign power to make laws for the protection of the public health<sup>1</sup>), and you cannot have acquired any rights even as against the government by relying on their representations." If it be said, "George was not born when I bought this land, and nobody had thought of that reasoning then or knew the natural law was so ; it is not fair that I should be made the victim of a discovery as to what the law is, made after I paid my well-earned money for the land," the answer is almost too obvious to be written : "If the law is not declared in your case, nobody will believe the law is so ; other men will buy land and base their calculations on it as you have done ; and when the question comes up again they will say not only all that you say now, but they will point to the decision in your case, and maybe those who have to pass judgment then will feel bound by that decision, and so the error will become fixed past remedy except by bloody revolution ; it often happens, when the law is found out to be different from what before it was understood to be, that somebody who had relied on the wrong understanding, suffers ; the reports of the decisions of the courts contain many such cases ; the judges are tormented by the hardship to the individual before them, but they must lay down the law as they see it to be, for their decision will affect the whole community for a long time ; when a new mechanical invention, such as the steam-engine, is introduced, much capital that had been theretofore invested shrinks greatly in value, and skilled artisans in the trades displaced by such invention can no longer find employment save as ordinary laborers ; yet nobody is so foolish as to say that the invention ought not to be introduced unless the capitalists and artisans who will suffer by it are first compensated ; what reason is there for any different rule when a discovery is made as to what the law is ? Remember, there are others than the landholders to be considered, — those other men who now have no land, but who, you admit, have as good a title as you have ; how is justice to be

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<sup>1</sup> Slaughter-House Cases, *supra*.

done to them if their rights are to be denied because you are not compensated?" Whatever way one turns the objection, the only real question appears to be whether the natural right of all men to the land and the inalienability of the governmental power to regulate its use are proved. If they are proved, such regulation as may be required to equalize natural opportunities cannot justly be prevented by failure to provide compensation for the present landholders.

To make sure, let us imagine two concrete cases which shall present the landholder's claim in as strong a light as possible. (1) Suppose a blacksmith to have saved from his hard toil \$1,000, with which he has purchased a small house and lot of land, the house worth \$500 and the land now worth \$500. Plainly this house and lot stand to him precisely as did the \$1,000 in the savings bank. They represent his labor, his thrift, his pluck, his temperance. Suppose now, George's plan goes into effect, and then the blacksmith dies leaving orphan children with no other means of support than the proceeds of that house and lot, which will now realize but \$600, the new system of taxation having wiped out \$400 of the value of the land. Is this just? (2) Suppose a farmer to be in possession of outlying land which he has had no occasion to use and which was purchased by his grandfather from the government, all that the government asked having been paid for it. For nearly a hundred years the government has held the purchase-money, has had the use of it, has had the chance to invest it at compound interest, so that now as against the government it may be deemed to have increased many fold. Meantime, by the growth of population, the land has become very valuable, so that were the farmer to sell it he would receive many times as much as his grandfather gave for it. Is it just that the government should now virtually take away that land without returning at least what it received therefor with fair interest? Consider the facts of these two cases well and see whether the question of justice which they raise does not depend upon remoter considerations. Suppose a wealthy capitalist were to bring an action of ejectment against the blacksmith's orphans, claiming that he had a better title. Would not the only question be whether he did have a better title? Can the decision of that question be affected in any manner by the hard case of the orphans or by the sterling virtues of their father? Everybody knows that such considerations must be rigor-

ously pushed aside, and that, though the orphans appeal most powerfully to the capitalist from the side of charity and mercy, they must be cast in the suit unless his claim of better title fails; he must have his right, if he insists; yea, if he demands it, the peremptory writ shall issue, though the orphans go upon the street to beg in cold and hunger. So in the farmer's case, is it not the only question whether the title which the government patented to the grandfather was qualified or not? If that title is and always has been subject to the qualification that the government might at any time regulate the use of all the land within its jurisdiction so as to equalize the natural opportunities of all its people, destroying utterly this very title if necessary to accomplish that end, then the government itself as proprietor held the land before conveyance subject thereto; it conveyed no higher title than rightfully it could convey, no greater interest than itself possessed; and its grantees have had and enjoyed exactly what was paid for (*viz.*, such title as the government had to convey), and of course cannot justly claim to have what was paid returned either with or without interest. So here too the controversy shifts back to the one controlling question.

So far as the demands of justice are concerned, the objection that George's plan is barred by the claim of existing landholders to compensation is of precisely the same character, and of as little weight, as would be a suggestion to the Supreme Court of the United States that a statute ought not to be declared unconstitutional or the decision of a lower court overruled because such statute or decision had stood many years, and the community had supposed it to be valid, parting with their money and making their calculations in that belief. We say now that the man who puts his faith in a municipal ordinance assumes the risk that the ordinance may be found to conflict with the statutes of the State. We say now that he who relies upon a statute does so at the peril that the statute may be held unconstitutional. Why do not the reasons which lead to these conclusions also compel us to say that he who lays out his money and his labor in reliance upon our written constitutions does so at the peril that those constitutions may be found and declared to be violative of the principles of right which underlie all positive laws.

Other objections have been put forward against the proposed change of laws, but they all fall equally wide of the mark. A glance at three or four of them will show this.

It is said that there is still an abundance of unappropriated land in the West, and that in the East land is cheap a few miles from cities and railroads; that any one who craves land can get it by going to these places; and that, therefore, there is not, now, at any rate, any just ground of complaint against the present system. Now, is not this a clear begging of the question? The argument for the change is, that all the people have an equal right to the land, and that, therefore, if one is permitted to have the exclusive occupancy and use of a particular parcel, he ought to pay to those who are excluded from that parcel a sum of money representing the difference, in respect of desirableness, between that parcel and other land which is still open to them to occupy. How is this argument met by saying that other land is still open to occupation?

Again; it is said to be unfair that a poor man should have to pay as much for the use of the land on which his cottage stands as the wealthy man pays for the land on which he has erected a palatial residence or a stately warehouse, even though the land is equally valuable in the two cases. But why? If the poor man and the wealthy man went to the same hotel, and took equally good rooms, ought not one to pay for what he takes as much as the other, regardless of their means or the use they put the rooms to? The cases are parallel, unless there is a difference between the relation of the two men to the hotel and their relation to the land. This objection assumes that there is a difference without proving it, and, therefore, begs the only question there is.

We are also told that material progress makes the condition of all the people better; George, it is asserted, is mistaken in supposing that progress and poverty go hand in hand. Assume that George is wrong about this; what then? Suppose twelve men engaged as partners in a business which is very profitable; suppose that five of the twelve take many times as much of the profits as by the partnership articles they are entitled to; if the seven call upon the five to account, will it be open to the five to say that they left so much of the profits untouched that the share of each of the seven was more than he could have got in any other business? George contends that the natural rights of men stand for partnership articles, so far as the land is concerned, and that by means of the legal institution of private property in land, some men take more than their just share of the profits according to the articles.

The question is whether he is correct or not in that contention. A solution of this question is not helped by saying that every one makes a profit now and is going to make a larger one hereafter if we continue to progress.

Another objection is that the value of land generally is not more than, nor so much as, the values in labor and capital that have been put upon it since its first settlement. But labor and capital, when applied to land, no more make stable changes therein than when applied to any other *matter*. After a time the form which they give to land and the changes they make in it, under the influence of natural forces, lose their distinctness, and eventually the land relapses to its natural condition unless additional labor and capital are laid out upon it. This is the tendency at all times. Hence it is immaterial how much labor and capital have been expended in the past upon a given parcel of land unless it can be shown that its present market value was caused wholly or partly thereby. Upon so much of present market value as can be shown to be due to this cause there would be no tax under George's plan.

It will serve no useful purpose to comment further upon objections. Enough has been said to make it clear that George's argument has not been understood. That being so, it would be strange if critics did not go astray in their objections.

Has every man, as against all other men, a natural right to land unlimited, save by the equal rights of others? Is it the primary function of government to secure to all its people their natural rights, including the right to land? Can government do this unless it is possessed of an inalienable power to regulate at will the use of land in any manner that may be adapted to that end? Is the legal institution of private property in land inconsistent with such inalienable power, and with such natural right? Will the exaction and application to common uses of economic rent secure the right? These are the questions upon which the justice of the proposed legislation depends. Till they shall have been understood, considered, and argued by those competent to the task, it will never truly be said that George has been refuted. Meantime, with unquestionable sincerity, with remarkable energy and ability, and with the confidence which comes from unanswered reasoning, he is teaching the discontented masses of the people that they have a real grievance.

*Samuel B. Clarke.*

NEW YORK.

# HARVARD LAW REVIEW

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THE following committee has been appointed by the Council of the Harvard Law School Association to award the prize offered for the best essay: Louis D. Brandeis, LL.B., '77; Abbott Lawrence Lowell, LL.B., '80; Winthrop H. Wade, LL.B., '84.

THE popular notion that the only thing necessary for the breaking of a will is a contest, does not seem well founded in the light of the experience of the Surrogate Court of New York City. Of seven thousand wills probated in that court in the last six years, less than four hundred were contested, and of these but fifty were broken.

A CURIOUS point came up recently in Massachusetts in the celebrated case of *Stogdale v. Baker*, in which the defendant was sued for malpractice. On the fourth trial, before entering on the examination of witnesses, the counsel for the defence moved that the plaintiff should file a bond, with proper securities, for the payment of all the costs of the trial suit, in all the four trials, if, in this trial, the jury rendered a verdict for the defendant. The Court granted the motion. The verdict was subsequently given for the defendant.

IN the report of the Treasurer of the Association, the names of the contributors to the fund for increasing the instruction in Constitutional Law are given as follows: James C. Carter, Esq., of New York, \$500; William G. Russell, Esq., of Boston, \$100; George O. Shattuck, Esq., of Boston, \$100; John Lowell, Esq., of Boston, \$100; George Putnam, Esq., of Boston, \$50; William Minot, Jr., Esq., of Boston, \$25; Robert M. Morse, Jr., Esq., of Boston, \$25; James J. Storrow, Esq., of Boston, \$50; A. Lawrence Lowell, Esq., of Boston, \$25; Arthur L. Huntington, Esq., of Salem, Mass., \$25.

THE case of *Foster v. Wheeler*, 36 Ch. D. 695, raises the question of the effect of a contract to enter into a contract. Mr. Justice Kekewich says he has examined a number of the definitions of contract in the books, among them an American, Mr. Parsons, and settles on the one given by Mr. Pollock as the most satisfactory. His definition is "an act in the law whereby two or more persons declare their consent as to any

act or thing to be done or forborne by some or one of those persons for the use of the others or other of them." Taking "an act in the law" to be a matter "capable of having legal effect and concerned with rights and duties which can be dealt with by a court of justice," the learned justice concludes that an agreement between A and B to enter into a contract at some future time is not a contract; but that an agreement by A with B that he will make a contract (as for a lease of land in this case) with C, is a contract in law that may be enforced. Specific performance not being asked for at the trial, he gives damages to the plaintiff.

Lord Cairns' Act, 1858, first gave the right to assess damages to the Court of Chancery, but limited it to cases in which the Court had jurisdiction to grant specific performance. The Judicature Acts, 1873, took away this limitation by providing that the High Court and the Court of Appeal shall give all remedies that seem just either upon a legal or equitable claim properly before them under the Acts.

See Fry on Specific Performance, second edition, p. 552.

A RECENT discussion of the medical jurisprudence of inebriety, at the December meeting of the Medico-Legal Society of New York, was excellently summed up by Ex-Judge Davis in the two following propositions: <sup>1</sup> "First. That if—as all the medical experts there represented concurred in holding—inebriety be a disease, it is the duty of medical men to lead the community at large in the use of proper measures to extirpate the sources of that disease, or reduce them within the narrowest practicable limits, as is already done or attempted in the case of other diseases which afflict the community. Secondly. That the law treats inebriety, and must treat it, precisely like any other disease, that is to say, as no excuse for crime. If in a particular case the actual effect of inebriety is shown to be such that there was no criminal intent,—that is to say, no crime,—in such case it is not properly spoken of as an excuse for crime, but as a disproof of the existence of crime."

The "Daily Register" <sup>2</sup> suggests, in connection with expert testimony of medical men in such cases, that a "provision should be made under which all expert testimony of a medical character shall be made independent of the selection of parties, and placed, in respect to impartiality, though not perhaps in respect to controlling authority upon the jury, in a position like that of the Judge."

THE action of slander of title has become more common of late years under the influence of the sharp competition of modern trade. The nature of that action has been decided in the recent English case of *Hatchard v. Mege*,<sup>2</sup> which was an action for falsely and maliciously publishing a statement injurious to the plaintiff's trade-mark. The plaintiff died after the commencement of the action; the question arose whether the right of action survived to his personal representatives. It was held that, in so far as the claim was for the libel against the plaintiff, the right of action was put an end to by the plaintiff's death; but in so far as the claim was in the nature of slander of title for maliciously decrying the plaintiff's property and producing special dam-

<sup>1</sup> The "Daily Register," Jan. 5, 1888.

<sup>2</sup> 18 Q.B.D. 771.

age to the plaintiff, this was not an action of libel, but was "rather in the nature of an action on the case for maliciously injuring a person in respect of his estate;" and being an action for injury to the plaintiff's property, the right of action survived his death and continued to his personal representatives.

In the somewhat analogous case of *Oakey v. Dalton*,<sup>1</sup> an action for the infringement of a trade-mark, it was held that the injury complained of, being an injury not to the deceased plaintiff personally, but to his property in the trade-mark, the maxim *Actio personalis moritur cum persona* did not apply, and the right of action passed to the deceased plaintiff's personal representatives as part of the personal estate.

IN the following extracts we present the substance of the recent circular issued by the Council of the Harvard Law School Association:—

"Since the publication of the last circular, in April, 1887, the number of members has increased from 558 to 653. During the year 1886-87 six members have died and three have resigned, making the present membership of the Association 644.

"The Council finds the most valuable and gratifying evidence of the good work done by the Association during the past year, in the increase of the number of students in the Harvard Law School at the opening of the present academic year. The Faculty of the Law School attribute this increase of students in no small degree to the influence of the Association, and the HARVARD LAW REVIEW of October, 1887, adds its testimony to this gratifying fact. . . . At a meeting of the Council, held November 19, 1887, a committee on the Harvard Law School, for which provision is made in the Constitution, was elected. The following gentlemen comprise this committee for the academic year of 1887-88: Abbott Lawrence Lowell, LL.B., '80, Chairman; Louis D. Brandeis, LL.B., '77; Winthrop H. Wade, LL.B., '84.

"The Council also voted to hold the next Annual Meeting and Dinner of the Association on Tuesday, June 26, 1888, the day before Commencement, at Cambridge. There will be an oration and addresses by eminent lawyers, and the Council will spare no efforts to make this meeting even more successful than the first. . . .

"The Council is anxious to increase still further the membership of the Association. With a list of one thousand members, which is the least the Association ought to contain, there would be a surplus in the Treasury each year, derived from the annual dues alone, which could be most usefully and effectively expended in promoting the objects of the Association.

"All persons receiving this circular are earnestly invited to join the Association, and can do so by sending their names and addresses to the Treasurer, Winthrop H. Wade, Esq., 10 Tremont street, Boston, Mass., and the sum of two dollars in payment of the initiation fee (\$1) and the annual due (\$1) for 1888.

"The Treasurer has on hand about 250 copies of the Memorial Pamphlet, published by the Association, which he will send to new members as their names are received. This pamphlet contains a full account of the organization and first general meeting of the Association, at

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<sup>1</sup> 35 Ch. D. 700.



Cambridge, November 5, 1886, including the oration of Hon. Oliver Wendell Holmes, Jr., and the addresses delivered at the dinner.

"Each member is requested to notify the Treasurer of any change in his address as soon as it occurs; and new members, at the time of joining, are requested to send their names in full, with their home and business addresses. Present addresses of members are wanted, not only for the use of the Association, but also for the new and extensive catalogue of all the former members of the Harvard Law School, now in preparation by the Librarian, Mr. John H. Arnold. This catalogue will be published early in June next, and it is expected that a copy will be sent free to each member of the Association."

IN the work of Mr. Finch, Law Lecturer at Queen's College, Cambridge, we recognize an undertaking which inaugurates in England the method of instruction established in this school by Professor Langdell seventeen years ago. Legal education in England may be said to be entering on a fourth stage. At a very early period the Inns of Court seem to have been, in effect, organizations clustering around the professors of the common law at London, maintaining the teaching and practice of the common law against the temporary popularity of the civil law.<sup>1</sup> But, by the end of the sixteenth century, they had lost this character, and up to the first half of the present century systematic legal education in England was stagnant. What was given at the universities does not seem to have had any great value placed upon it. Lord Brougham once said,<sup>2</sup> "I won't say it's a humbug; but it's something very like it. When I was attending lectures on the civil law in Edinburgh, they were all in Latin. A set of Latin questions were proposed after the lecture to the students. Very difficult, indeed, some of them might be to answer, if a proper answer were required; but all we had to do was, if the question commenced with '*Nonne*,' we said '*Etiam*;' and if with '*An*,' we replied '*Non*.'" The office of a practising lawyer was the only place in which the law could be learned, if at all. The eminent authority just mentioned thus sketched the process of legal training in his day: "It is a most melancholy state of things. There is nothing like education for law students now. When I was in the chambers of Mr. (afterwards Chief-Justice) Tindal, we seldom or never saw our master; we were told, 'Copy whatever you can lay hold of,' and with that injunction we were left to ourselves;" and Professor Dicey adds his testimony concerning the state of affairs at the present day: "He is put to make bricks without straw, or rather without having even been taught how bricks are to be made. The oddity of the thing is that he, after all, gets in due time, mainly by the process of imitation, to make pretty tolerable bricks." Towards the end of the half-century an effort began towards a system more helpful and better suited to the dignity of the science of the law. The matter was taken up by the Society for the Amendment of the Law, and was vigorously discussed. A committee of inquiry of the House of Commons was appointed in 1846 to report on the state of legal education; and a commission, including Vice-Chancellor Wood and Sir John

<sup>1</sup> Fortescue, *De Laudibus*, c. 48-9; Gneist, *Eng. Const.*, i, 393; Foss, *Judges*, ii, 201, iv, 249; Report of House of Commons Committee on Legal Education, 1846, p. 6; 1 Bl. 23.

<sup>2</sup> 12 Law Rev. 114.

Coleridge, was appointed in 1855 to report on the Inns of Court. Both these bodies recommended the establishment of a University of Law, under the control of the Inns; but the outcome seems to have been not much more than a zealous increase of the number of lectures by the Readers of the Inns. The old system was revived, not materially altered.

In 1871 (when Professor Langdell's incumbency in this school had but begun) Professor Bryce and Professor Dicey came to the United States and visited several law schools. The Columbia Law School received from them the most favorable comment,<sup>1</sup> at the head of which was (and still is) Professor Dwight, a man of great personal magnetism. The idea of a University of Law was now again mooted by the Society for Legal Education, having at its head Lord Selborne, who carried through in 1873 the measure reforming the judiciary system. The principal material result seems to have been that the readers of the Inns were replaced by professors and tutors, the number being increased. Among these were included, in 1873, such scholars as Amos, Broom, and Hunter, and, in 1886, Pollock, Bryce, and Harrison. An extension, within the last fifteen or twenty years, of the number and scope of the subjects required for the law degree at the larger universities shows the wide workings of this spirit of improvement. In 1883 appeared Professor Dicey's plea for the teaching of English law at the universities. Early in 1885 Mr. Finch visited the Harvard Law School, and by his lectures at Cambridge is now introducing what may fairly be called, according to the "Law Quarterly Review," the method of Professor Langdell. In the fall of 1885 came Professor Pollock, and visited the Harvard Law School, and the impression produced by its method of instruction has been an important influence, as he tells us in the preface to his "Treatise on Torts," not only in his teaching but in his writing also. Whether Professor Dicey follows the case method or not we do not know. Mr. Finch has published a *Selection of Cases on the English Law of Contract, Part I.*, and an inaugural address on *Legal Education, its Aim and Method*. The important features of this fourth stage of legal education in England are (a) the radical change in the source of instruction,—for it now begins to be given at universities by scholars holding university professorships, instead of in London by barristers under the auspices of the Inns of Court; (b) the adoption of the Langdell method by Mr. Finch,—for though there are strong reasons why it was natural to follow an American method, it seems somewhat noteworthy that the long-tried and thorough methods of legal education in Germany, for instance, should have been passed over, more especially as the genius of the English law student is not suited, according to eminent English authority,<sup>2</sup> to the practice of oral discussion in class.

It should be observed that, long before the present generation, resort was had to the professors of an American law school for suggestions upon legal education. In the legal reform discussions of 1840-56, the names of Professor Greenleaf and Mr. Justice Story were more than once mentioned in connection with the proposed Law University.<sup>3</sup>

<sup>1</sup> See 25 Macmillan's Mag., at 127 and 209.

<sup>2</sup> A.V.D. in 2 L. Q. Rev. 88.

<sup>3</sup> 3 Law Rev. 379; 12 *id.* 379; Report, *supra*, Append. p. 349-50.

## THE LAW SCHOOL.

## IN THE MOOT COURT.

*Coram* THAYER, J.*Bispham v. Brown.*

THE opinion contains a sufficient statement of the facts.

The plaintiff sues in contract, *first*, on an oral agreement by which he undertook to do certain work for the defendant upon his request, and the defendant, in consideration thereof, was to do certain work for the plaintiff, — alleging performance by the plaintiff and a refusal to perform by the defendant; and, *second*, for work and labor. The answer to both counts is a general denial. At the trial, at the close of the plaintiff's testimony, the Court ruled that the action could not be maintained upon either count, and directed a verdict for the defendant. The case comes up on exceptions to these rulings.

It appears that the plaintiff and defendant orally agreed on April 5, 1882, that the plaintiff should convey to defendant two houses, and that the defendant, in consideration thereof, should pay the plaintiff \$5,000 and give him a lease of a certain hall for five years. By April 10, the deed and lease were given, the money paid, and the agreement, so far, was fully executed.

But it further appears that on the same fifth of April, "after the above agreement was made, but during the same conversation, the defendant promised to put a hard-pine floor in the hall when the plaintiff should request it; and that the plaintiff promised to cement the cellars in the two houses when the defendant should request it." This agreement also was oral; and when the deed and lease were subsequently executed, it does not appear that anything was said about it. It was not inserted in those instruments or either of them. But, nevertheless, within a few days, on April 15, the defendant requested the plaintiff to do the cementing, and he did it; and soon afterwards when the plaintiff called on the defendant to lay the floor in the hall, the defendant appears to have made no other objection to doing it than that he wished first to know for what use the plaintiff intended to let the hall.

The situation, then, was this: The parties orally agreed to make reciprocal written transfers of property. During the same conversation, but afterwards, they mutually agreed to do, each upon the request of the other, certain things to the property thus to be transferred. These agreements might, naturally and properly enough, have been inserted in the deed and lease; but they were not so inserted. They were not agreements which the law requires to be in writing; and they were not inconsistent with anything contained in either of the two instruments above named. That the parties, in executing these papers and omitting the oral agreements, meant no waiver or abandonment of them, is plainly indicated by the fact that, within a few days after the execution of the documents, one party called on the other to perform his part of it, and the latter complied; and this conclusion is supported

also by the defendant's reply, when he was in turn called upon soon afterwards to perform his part. The written conveyance and lease appear then to have been made, not for the purpose of reducing the previous oral agreements to writing, but in order to partly excuse those agreements.

The defendant, nevertheless, contends that the plaintiff, although he has performed his part of the oral agreement, cannot maintain this action against the defendant for refusing to perform it on his side. In sustaining this contention, the Court below adopted the defendant's request for a ruling, and held that "no verbal agreement between the parties to a written contract and made before or at the time of the execution of such contract are admissible to vary its terms or affect its construction." This ruling, and the general principle which it invokes, seem to be inapplicable to the facts of this case. The plaintiff is not seeking to fix upon the writings here any disputed interpretation or construction; no question of that sort arises. Nor is he seeking to vary or add to the terms of the writings, in the sense of reading into them and making operative as if it were a part of them, that which is not therein expressed. The bill of exceptions does not find any covenant or agreement in either the deed or lease; and we cannot assume that there was any other contract in either of them than such as is implied by law from the ordinary terms of such instruments. The oral agreements are in no way inconsistent with anything implied or expressed in the writings. They leave them to their full operation, and only set up other and distinct matter relating to the property granted and conveyed, in a case where it plainly appears that the parties did not intend the writings to be the full expression of all their previous contracts relating to the property in question. There is no authority for the doctrine that a written agreement is exclusively taken to merge all previous and contemporaneous oral contracts relating to the same subject-matter, even such as are not inconsistent with the writing; while in general this will be presumed as regards all such terms as would naturally and properly be inserted in the writings (and clear evidence will be required of the contrary), yet it is open to inquiry whether the fact be so or not. The question is one for the Court; and in determining it, there is no rule which limits the evidence to the contents of the writing itself. The doctrine, as regards this point, of such cases as *Naumberg v. Young*, 15 Vroom, 331, and *Hei v. Hiller*, 53 Wis. 415, is not well sustained. The point is to be determined in the same manner as the questions whether the parties really have reduced the contract to writing or not, and whether they have adopted the writing as binding,—matters upon which the mere signature is never conclusive and all evidence ordinarily receivable is admissible. *Buzzell v. Willard*, 44 Vt. 44; *Jones v. Hardesty*, 10 Gill & Johnson, 404, 416; *Ludeke v. Sutherland*, 87 Ill. 481; *Linan v. Smart*, 11 Humph. 308; *Preble v. Baldwin*, 6 Cush. 549; *Chapin v. Dobson*, 78 N.Y. 74; *Morgan v. Griffith*, L.R. 6 Ex. 70; *McCormick v. Cheevers*, 124 Mass. 262; *Graffam v. Pierce*, 143 Mass. 386. The case of *Eighmie v. Taylor*, 98 N.Y. 288, does not lay down a different doctrine. In *Angell v. Duke*, 32 L.T. Rep. N.S. 320, the case went upon the point of fact that the parties intended the lease to contain their full agreement.

Even if the plaintiff could not recover upon the express contract, as it is now held that he can, he would yet have a good cause of action on the second count, for work and labor. His contention under this head seems well sustained by the cases cited in the second division of his brief.

*Exceptions sustained.*

### CLUB COURTS.

#### SUPERIOR COURT OF THE POW-WOW.

Defendant's grantor covenanted for himself, his assigns, etc., that when he or they should use a certain party-wall to be erected partly on plaintiff's land, he or they would pay to plaintiff's grantor, his assigns, etc., one half the cost of said wall. In order that the plaintiff may succeed in this action it must appear that the right to sue has passed to the plaintiff, and that the liability to be sued has passed to the defendant.

This is clearly not a covenant running with the land in equity, for such covenants are agreements not to do something; the proper remedy for the breach of which is an injunction. Is this, then, such a covenant as would run with the land at law? Where the relation of landlord and tenant exists, the liability of the parties is regulated by statute, and both the benefit and the burden of such covenants run with the land (32 Henry VIII. c. 34). This relation did not exist here, and it is tolerably well settled in England that in such a case the burden of the covenant does not run (Smith's Lead. Cas. 8th Eng. ed. 103).

Under some circumstances, however, the benefit of the covenant may run if the parties intend that it shall. If it relates to a thing not *in esse*, the word "assigns" must be expressly mentioned; furthermore, the covenant must "touch the use or enjoyment of the land;" *i.e.*, it must be of use to the covenantee as owner of the land with which it runs.

Now, this is a covenant to pay money to the first builder, his assigns, etc. It cannot be said to benefit him as owner of any lot of land. It must be distinguished from a covenant to dig a ditch, for example, upon a lot of land the performance of which would benefit the covenantee or his assignee only if he were the owner of the lot.

Upon the English view, therefore, neither the benefit nor the burden of this covenant runs.

The American cases generally make the question turn on whether there is privity of estate between covenantor and covenantee. As the term "privity" is loosely used, it has led to great confusion. The most satisfactory result is reached by the New York courts, which define privity as meaning the relation of landlord and tenant. *Coles v. Hughes*, 54 N.Y. 444; see also 90 N.Y. 663.

In Massachusetts another view of privity obtains. "The same privity that exists between lessor and lessee exists between grantor and grantee where grant is made of any subordinate interest in land." *Morse v. Aldrich*, 19 Pick. 449. In this view there is privity where an easement has been created, and a recovery would be allowed in the present case. *Savage v. Mason*, 3 Cush. 500.

The Court is of opinion that the defendant is not liable, on the grounds that there is no tenure, and that the covenant cannot be said to be beneficial to the plaintiff as holder of the land.

## LECTURE NOTES.

AS TO THE EFFECT OF THE REQUIREMENTS OF THE STATUTE OF FRAUDS ON DECLARATIONS OR CREATIONS OF TRUSTS OF LANDS. — (*From Prof. Ames' Lectures.*) — By the seventh section of the Statute of Frauds all declarations or creations of trusts of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party declaring such trusts.

Three views have been advanced as to the effect of the statute in requiring a writing: — *First*.<sup>1</sup> That the statute has introduced a new formality requisite to the validity of such a trust or contract. This view is untenable, since it would bar a subsequent memorandum. *Second*.<sup>2</sup> That the statute introduces a rule of evidence. This view has been countenanced by many writers, but is open to objection, since by it those cases are wrong which hold that, under the seventeenth section of the statute, the memorandum must exist at the time of the bringing of the suit; and the fact that the statute must be pleaded affirmatively, seems inconsistent with this view. *Third*.<sup>3</sup> That the statute has changed the procedure, giving a defence to the party to be charged. The effect of this view is, that if there are the common law requisites of a trust, there is a valid trust, though, if of lands, it is not enforceable unless there is a proper memorandum.<sup>4</sup>

Under this view, *Gardner v. Rowe*<sup>5</sup> was correctly decided. It appeared in that case that one Wilkinson, shortly before his bankruptcy, made a transfer of a lease by an indenture reciting that the property had originally been assigned to him upon trust for the transferee. It was held that the transfer could not be set aside by Wilkinson's creditors, the jury having found that the original conveyance to him was in fact upon trust.<sup>6</sup>

On the same principle, if an oral contract to sell land is made before the marriage of the grantor, and a conveyance in accordance with the contract is made after the marriage, his wife has no dower in the premises.<sup>7</sup> Again, suppose that A agrees orally to convey land to B, and, later, agrees in writing to convey the same land to C. He then conveys to B, who has notice of the written contract with C. B is entitled to hold the land.<sup>8</sup>

In *Hutchinson v. Tindal*<sup>9</sup> the complainant claimed the land in question by a title superior to that of the defendant. The defence was

<sup>1</sup> Smith on Contracts, p. 117; *Marsh v. Hyde*, 3 Gray, 331, 333.

<sup>2</sup> Browne on Statute of Frauds, § 115, and note a.

<sup>3</sup> "The Effect of the Seventeenth Section of the English Statute of Frauds," 9 Am. Law Rev. 434.

<sup>4</sup> In *Wheeling Ins. Co. v. Morrison*, 11 Leigh (Va.), 354, at 365, the Court says: "A parol contract is not void by the Statute of Frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is introduced for his benefit by the statute, and may, of course, be renounced by him. If he is willing to abide by it; if disdaining the *mala fides* of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligations, shall it not be enforced? Let the unvarying course of equity cases answer the question. How can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him is not to be so considered? The pretension I conceive to be utterly without foundation."

<sup>5</sup> 3 Simon & Stuart, 346; Ames' "Cases on Trusts," 187.

<sup>6</sup> *Patton v. Chamberlain*, 44 Mich. 5; *Jamison v. Miller*, 27 N.J. Eq. 586; *Siemon v. Schurck*, 20 N.Y. 598; *Cramer v. Blood*, 48 N.Y. 684; *Powell v. Ivey*, 88 N.C. 256; *Hyde v. Chapman*, 33 Wisc. 391; *Sackett v. Spencer*, 65 Pa. 89; *Ocean Nat. Bank v. Hodges*, 9 Hun. 161; *Hays v. Reger*, 102 Ind. 524, accord. But see *Smith v. Lane*, 3 Pick. 205; *Holmes v. Winchester*, 135 Mass. 299. Compare *Bancroft v. Curtis*, 108 Mass. 47.

<sup>7</sup> *Oldham v. Sale*, 1 B. Monr. 76.

<sup>8</sup> *Dawson v. Ellis*, 1 Jacob & Walker, 524; *Clark's admr. v. Ruck*, 7 B. Monr. 583.

<sup>9</sup> 2 Green, Chan. 357; Ames' "Cases on Trusts," 194.

a secret trust, which the defendant was willing to carry out; but it was held that the allegations respecting the trust were not proved by the mere answer of the defendant, which was not responsive to the bill, and that the plaintiff must prevail. In *Jamison v. Miller*<sup>1</sup> the Court said, referring to this case: "If the fact of a trust be proved by evidence competent to establish it as against the complainant, I see no reason, either in principle or the authorities, to doubt that an answer signed would be a sufficient manifestation of the trust to satisfy the statute, whether responsive to the bill or not."<sup>2</sup> It would seem, therefore, that in *Hutchinson v. Tindal*, if the secret trust had been proved by competent evidence, the allegations of the defendant would have been a good defence by way of plea. Therefore, the decision in the case is not consistent with *Gardner v. Rowe*.

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## RECENT CASES.

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**AGENCY—IMPUTED KNOWLEDGE.**—Ship-owners instructed a broker to reinsure an overdue ship, "lost or not lost." The broker, while acting in this behalf, acquired knowledge material to the risk, which he did not communicate to the owners. The latter afterward secured a policy through another agent. The ship had, in fact, been lost some days before the insurance was applied for, but neither the owners nor the last agent knew it. *Held*, that the owners could recover on this policy, the knowledge of the first broker not being attributable to them. *Blackburn v. Vigors*, 12 Ap. Cas. 531.

**AGENCY—LIABILITY OF PRINCIPAL FOR AGENT'S MISREPRESENTATIONS.**—The general superintendent of a company, for the purpose of securing a loan from the defendants on his individual account, represented that he had grain stored in the company's warehouse, when, in fact, he had none. On his giving them a receipt for it in the name of the company, the defendants advanced the money. *Held*, the company is not liable on the receipt. But where the defendants had loaned money on a receipt identical with this one to a third party, the Court held the company liable. *Planters' Rice-Mill Co. v. Olmstead*, 3 S.E. Rep. 647 (Ga.).

**ATTACHMENT.**—Plaintiff conducted a saloon through an agent who had a license in his own name and represented himself as owner. Liquors were attached as the property of the agent. The plaintiff brought an action of replevin, and it was held that where the sale of liquor without a license is illegal, such property is not subject to attachment, because it cannot be sold. *Barron v. Arnold*, 11 Atl. Rep. 298 (R.I.).

**BILL OF LADING—PERILS OF THE SEA.**—Rats gnawed a hole in a pipe connecting the bath-room of a vessel with the sea, and sea-water entered and damaged the cargo. It was held, reversing a decision of the Court of Appeal, that the injury was caused by a peril of the sea, within the exception in the bill of lading, and the carrier was not liable. A peril of the sea is "a sea damage, occurring at sea, and nobody's fault." *Hamilton v. Pandorf*, 12 Ap. Cas. 518.

**CHECKS—FORGED SIGNATURE.**—A forged check was paid by the bank on which it was drawn, and the drawer did not discover the forgery for seventeen days after his book was balanced up and the check returned. He then gave notice to the bank. It was held that it was not too late for him to set up the forgery. The Courts distinguish between checks in which the amount is raised and those in which the signature is forged. A depositor has a complete right to assume that the bank has only paid the checks signed by himself, and is under no obligation to investigate for the benefit of the bank. If he gives notice of a forgery whenever it comes to his notice, it is the most that can be required of him. *Cincinnati National Bank v. Creasy*, 18 Weekly Law Bulletin, 410 (Superior Court of Cincinnati).

<sup>1</sup> 27 N.J. Eq. 586, at 593.

<sup>2</sup> See also *Patton v. Chamberlain*, 44 Mich. 5.

**CONSTITUTIONAL LAW—ACTION AGAINST A STATE.**—The State of Virginia put such restrictions upon the method of proving its tax receivable coupons as to impair its contract obligation within Article I., Section 10, of the Constitution. The Act also provided that the State officers should at once bring suit against those tendering coupons without the requisite proof as delinquents. *Held*, that under the eleventh amendment the Circuit Court had no jurisdiction to enjoin the officers from bringing such suit. *Osborn v. Bank*, 9 Wheat. 738, see *supra*, p. 223, in which State officers were enjoined from seizing property for taxes in pursuance of a levy under an unconstitutional State law, and *Poindexter v. Greenhow*, 114 U.S. 270, in which the treasurer of Virginia was enjoined from collecting taxes by distress after a tender of coupons, were both distinguished on the ground that the defendants were enjoined in those cases as individuals; the State was not a party at all. As individuals they must make out their defence under the law of the United States, and the State statute, being unconstitutional, would not be regarded. In the present case the only party bringing the suit against such an injunction is asked is the State, though of necessity represented by its officers. Harlan, J., dissented, holding that the cases were not distinguishable. *Virginia Coupon Case*, *Ex parte Ayers*, 8 Sup. Ct. Rep. 164.

**CONSTITUTIONAL LAW—PROHIBITORY LIQUOR LAW.**—It is within the police power of a State to prohibit the manufacture and sale of intoxicating liquors, and although it results in greatly diminishing the value of property engaged in the business, it is not depriving "any person of life, liberty, or property without due process of law." Mr. Justice Field dissents, on the ground that, conceding the right to stop the use of property for purposes deemed injurious to society, the State has not the right to destroy any property, which might be used for other purposes, without compensation to owners. He thus objects particularly to the clause which gives power "to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance." *Mugler v. State*, 36 Alb. L.J. 525 (U.S. Sup. Ct.).

**CONSTITUTIONAL LAW—REGISTRATION OF VOTERS.**—A law which requires the voter to register on one of four days, the last one being ten days prior to the election, is unconstitutional as hindering the free exercise of suffrage. *State v. Conner*, 36 Alb. L.J. 444 (Neb.); 34 N.W. Rep. 499, s.c. See *Kinneen v. Wells*, 144 Mass. 497.

**CONSTITUTIONAL LAW—VESTED RIGHTS.**—An Act of Congress of March 3, 1887, annulled the charter of the Mormon Church which had been granted by the legislative assembly of Utah, dissolved the corporation, and authorized proceedings to wind up its affairs and have certain property declared forfeited to the school-fund of the Territory. A bill was filed under this act, and it was held that a charter from a territorial government gives no vested rights, since it must be deemed to be accepted with knowledge that the United States has authority to change or repeal it. *United States v. Church of Jesus Christ of Latter-Day Saints*, 15 Pac. Rep. 473 (Utah).

**CONTRACT—CONSIDERATION.**—The rule that the acceptance of part payment for a debt is no consideration for the extinguishment of the debt has no application where property instead of money is received. *Hasted v. Dodge*, 35 N.W. Rep. 462 (Iowa).

Mutual promises by husband and wife to drop all differences and perform certain duties toward each other are without consideration as being promises to do what they are already bound to do. *Miller v. Miller*, 35 N.W. Rep. 464 (Iowa).

**CONTRACT—OUSTING THE COURTS OF THEIR JURISDICTION.**—One who had undertaken to construct a certain section of a railroad, agreed that the estimates of the work made by the company's engineer should be conclusive against him, "without recourse or appeal." The contractor was dissatisfied, and brought an action. It was held that the stipulation to abide by the estimates of the engineer was not binding even in the absence of fraud or mistake. *Louisville, etc., R. Co. v. Donnegan*, 25 Cent. Law Jour. 513 (Ind.).

The case is criticised in a note, and the authorities are examined at considerable length.

**DOMICILE—STUDENT'S RIGHT TO VOTE.**—A student at college may acquire a legal residence so as to be entitled to vote where the college is located, if he, in good faith, elects to make that his home to the exclusion of all other places; and this though he may intend to leave the place at some fixed time or at some indefinite period in the future. *Pedigo v. Grimes*, 13 N.E. Rep. 700 (Ind.).



**EQUITY JURISDICTION — FRAUDULENT PROMOTER OF MARRIAGE LIABLE TO ISSUE.** — A devised land to B, but if he died without issue to C and his heirs. B conveyed to D. D, becoming alarmed lest B should die without issue, represented to the plaintiff's mother that B had a fine property left to him, which would go to the heir, and thus induced her to marry B. The plaintiff, the sole issue of the marriage, filed a bill against D for a conveyance of the land. *Held*, equity will treat D as a constructive trustee for the plaintiff, and compel him to convey. *Piper v. Hoard*, 13 N.E. Rep. 626 (N.Y.), affirming the decision of Supreme Court.

The Court go upon the ground that one who makes a representation as to the estate of the proposed husband, forming an inducement to the marriage, is bound to make it good in the manner represented. The plaintiff, being the issue, is considered to have all the rights of her mother, especially since, if the representation had been true, all the property would have gone to the plaintiff. Upon legal principles the result reached by the Court seems somewhat extraordinary. No authority is cited that in the least sustains the proposition, that D's misrepresentation about his property to the mother made him a constructive trustee for the mother, and so for her heir. Her remedy was at law for deceit. It may be possible to conceive that D's fraud was an equitable tort toward the unborn issue, but the right to the kind of relief here given by no means follows.

**EVIDENCE — LETTER-PRESS COPIES.** — "Letter-press copies are but copies, and cannot be introduced if the originals be unaccounted for, and it is not shown that they could not have been produced at the trial." *State v. Halstead*, 35 N.W. Rep. 457 (Iowa).

**EVIDENCE, PAROL.** — In an action on a promissory note, evidence that the defendant was not to pay except from sales of a patent washing-machine, and that that machine was so worthless that nothing was realized from such sales, is not admissible. *De Long v. Lee*, 34 N.W. Rep. 613 (Iowa). See also *Mason v. Mason*, 34 N.W. Rep. 208 (Iowa); *Appeal of Potts*, 10 Atl. Rep. 887 (Pa.); *Merchants' Exch. Bank v. Luckow*, 35 N.W. Rep. 434 (Minn.).

**EVIDENCE — PERFORMANCE OF A CONTRACT.** — Defendant agreed to pay \$1,000 for a page advertisement in a certain publication, on a guaranty that 100,000 copies would be mailed. In an action for the money it was proved that the full number of copies was delivered to the Brooklyn post-office, and that postage was paid at second-class rates. But it was also brought out that the publication was not entitled to transmission as second-class matter, and it was decided that performance was not made out, since there is no presumption that matter accepted at a post-office reaches its destination, unless the postal laws are complied with. *Brundage v. Sheffield*, 32 Daily Register, 1117 (New York City Court).

**EVIDENCE — WITNESS.** — On grounds of public policy a wife is not a competent witness for or against her husband in criminal cases in the United States Courts. *United States v. Jones*, 32 Fed. Rep. 569.

A note states modifications of this common-law rule, which are recognized in many jurisdictions in this country.

**FIXTURES, RIGHT TO REMOVE.** — A tenant who accepts a new lease does not thereby lose his right to remove fixtures unless the new lease expressly covers them, thus showing that such was the intention of the parties. *Second Nat. Bank v. Merrill*, 34 N.W. Rep. 514 (Wis.). See *contra*, *Loughran v. Ross*, 45 N.Y. 792; *Watriss v. First Nat. Bank*, 124 Mass. 571.

**FRAUD.** — A mortgagee was fraudulently induced to assign the mortgage on the supposition that she was merely extending the time. *Held*, that nothing passed by the assignment, even to an innocent holder. *Herchmer v. Elliott*, 23 Can. Law Jour. 414 (Ch. D. Can.).

**LARCENY — INVITO DOMINO.** — The keeper of a betting stand decamped with the money that he had taken in. He was prosecuted for stealing and convicted. A point was reserved as to whether there was any evidence of stealing to go to the jury. The conviction was affirmed, the Court holding that there was evidence of a preconcerted design to get the money by a trick, and, as the owners never intended to part with it except in a certain event which did not happen, the offence was larceny. *Regina v. Baickmaster*, 22 Law Jour. 166 (C.C.R.).

**MORTGAGE, CHATTEL — RESERVATION BY MORTGAGOR OF RIGHT TO SELL.** — The furniture in a hotel was sold and mortgaged back to secure the unpaid purchase-

money. The vendees reserved the right to sell any of this furniture for the purpose of purchasing other and better furniture to put in the hotel. *Held*, that the mortgage was void *ab initio* as to creditors and incumbrancers. *Brasher v. Christophe*, 15 Pac. Rep. 403 (Col.).

**MORTGAGE, CHATTEL — TITLE TO INCREASE.** — Under the Maryland Code a chattel mortgage is good without possession if it is recorded. Such a mortgage was given on "fifteen shoats." Nearly ten years later remote descendants of these shoats were sold under an execution against the mortgagor, who had never given up possession. The mortgagee claimed them against the vendee and succeeded. *Cahoon v. Miers*, 11 Atl. Rep. 278 (Md.).

This seems to be logical enough, but it suggests very pointedly the propriety of further legislation if a mortgage of chattels is in any case to be held good against third persons without a change of possession.

**PATENT — DRIVEN WELLS.** — Section 7 of the Act of March 3, 1839 (5 Stat. 354), has been interpreted as rendering unpatentable any invention publicly used more than two years before a patent is applied for, even though such use be without the knowledge or consent of the inventor. And on this ground the "Driven Well" patent has been overthrown, after withstanding for twenty years persistent attacks in the Circuit and Supreme Courts. See *Eames v. Andrews*, 122 U.S. 40; *Andrews v. Hovey*, 8 Sup. Court Rep. 101.

**PROMISSORY NOTES — BANKRUPTCY OF MAKER AND INDORSER.** — The holder of a note received a dividend from the indorser's assignees in bankruptcy, and was then allowed to prove for the whole amount of the note against the bankrupt estate of the maker. He could recover only the balance due. *Southern Michigan Nat. Bank v. Byles*, 34 N. W. Rep. 702 (Mich.).

**QUASI-CONTRACT — STATUTE OF FRAUDS.** — The plaintiff contracted orally with the defendant that the latter should instruct his son in dentistry for two years for a certain consideration. After a few months the boy left defendant, and the plaintiff sues on *quantum meruit*, for his services. *Held*, the contract not complying with the statute of frauds cannot be set up by the defendant as a defence. *Freeman v. Foss*, 14 N.E. Rep. 141 (Mass.).

**SALOON-KEEPER.** — Plaintiff and one F became intoxicated on liquor furnished them by the defendant in his saloon. F pinned a piece of paper on plaintiff's back and set fire to it, and serious injuries resulted. The defendant was held liable. "When one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ as of the drunken and vicious men whom he may choose to harbor." *Rommel v. Schambacher*, 5 Lancaster Law Review, 8 (Com. Pleas, Philadelphia Co., Pa.).

**TRUSTS, CONSTRUCTIVE — CONFIDENTIAL RELATION.** — Plaintiff purchased land of a corporation. The latter was indebted for a part of the purchase-money, and an action was brought to compel payment or a sale of the land. An officer of the corporation assured the plaintiff that his title would be made good. A sale was ordered; this officer became the purchaser, and then refused to confirm the plaintiff's title. *Held*, that as between the parties the title to the property would be treated as in precisely the same situation that it was in when the plaintiff was assured that his rights would be protected. *Allen v. Jackson*, 13 N.E. Rep. 840 (Ill.).

Compare *Appeal of McCall*, 11 Atl. Rep. 206 (Pa.); *Jenninas v. Langdon*, 11 Atl. Rep. 212 (Pa.), and cases collected in Ames' Cases on Trusts, 291, n.

**WILL — EFFECT OF CODICIL.** — Chas. O'Connor put a clause in his will releasing all demands against the persons named "in this will." Later he executed a codicil republishing the will with a bequest to the defendant. Nothing was said about releasing any demands against him. The executor now sues for a \$50,000 fee of his testator for services in the Tennessee bondholder's case. *Held*, the word "will" did not include the codicil. *Sloane v. Stevens*, 25 Cent. L.J. 540 (N.Y.); 13 N.E. Rep. 618, s.c.

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## THE ANARCHISTS' CASE BEFORE THE SUPREME COURT OF THE UNITED STATES.

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**A**MONG the *causes célèbres* of American criminal jurisprudence, the case of *The People v. Spies et al.*<sup>1</sup> will hold a prominent position. The atrocity of the act for which the defendants were prosecuted, the protracted trial, the intense popular interest in the issue, and the resort to all possible expedients to overthrow the result at which the trial court and the jury had arrived, — expedients including an appeal to the Supreme Court of the United States, and a petition for an inquiry as to the sanity of the prisoners after they had been condemned to death, — will make it a source of permanent interest to lovers of the sensational, while the points of law involved will render it worthy of the attention of the legal student.

But while the points of general municipal law raised in this remarkable case are both important and interesting, the purpose of the present article is not to consider them, but to deal with the case solely in its relation to the federal tribunal.

The circumstances which led to the prosecution of Spies and his seven associates, for the murder of Matthias J. Degan, are familiar to every one. That prosecution culminated in the judgment of the Supreme Court of Illinois affirming the judgment of Judge Gary. Then, and then only, did the opportunity occur for

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<sup>1</sup> Reported on appeal, 122 Ill. 1; and 123 U. S. 131.

the long-threatened appeal to the Supreme Court of the United States, and, on October 21, 1887, counsel for the accused petitioned the full bench for a writ of error to the Supreme Court of Illinois, on the ground that the judgment of that court — the highest State tribunal — denied the accused rights secured to them by the Constitution of the United States.

In order to give the Supreme Court jurisdiction of such a writ of error it is necessary that the record shall show that a federal question was raised, and that the State court decided it adversely to the right claimed; and to constitute a federal question it must appear that there is, in the words of the Revised Statutes, section 709, "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority;" if there is, such final judgment or decree "may be reëxamined and reversed or affirmed in the Supreme Court."

In courts of limited jurisdiction, as are those of the United States, the facts requisite to give jurisdiction must appear affirmatively on the record; it is not enough that no objection is made; unless the facts plainly appear the court has no authority to pass upon any point raised, and will, of its own motion, if necessary, dismiss the case. In such a court, therefore, the primary question must always be whether the case shown is one of which it has cognizance; whether any question is presented which under its delegation of power it has a right to decide; and when this preliminary point is disposed of, the court may, and must, in the fulfilment of its solemn duties, proceed either to decide the question, if any there is, thus properly brought before it, or dismiss the whole cause as one not cognizable by it.

That it has not been customary in the practice of the Supreme Court to inquire too closely as to the existence of the necessary facts before granting a writ of error, in those cases where the writ has been granted by a member of that court, and not by the State court, appears from the frequency with which motions to dismiss for want of jurisdiction have been granted. But in the present case it seemed best, in the exercise of an undoubtedly wise discretion, in deciding the motion to grant the writ, to pass on questions more usually determined upon a motion to dismiss or affirm, to examine the record and ascertain "whether any question reviewable here was made and decided in the proper court below," and "whether it is of a character to justify us in bringing the judgment here for reëxamination."

The claim of the petitioners, as stated by Chief Justice Waite in his opinion, was substantially as follows: "1, That a statute of the State as construed by the court, deprived the petitioners of a trial by an impartial jury; and, 2, that Spies was compelled to give evidence against himself," in violation of rights secured by the United States Constitution. As to the second proposition the court was of opinion that the limits of cross-examination were not a matter of federal law, and that the constitutional objection to the use of evidence obtained by an unlawful seizure was not raised in the trial court, and therefore could not be considered; but it may be assumed, since the contrary is nowhere stated, that the accused had, at the proper time and in the proper manner, claimed a right, under the Constitution of the United States, to an impartial jury, and impeached the validity of the State jury law and the action of the State court as impairing that right. This was undoubtedly sufficient to enable the court to take cognizance, for it is firmly settled law that there is jurisdiction, however clear the question presented may be, provided it is a federal question properly raised and adversely decided; although the right claimed is wholly without foundation, it is within the power delegated to the court to pass upon it if it is claimed under the national Constitution.

But it must be borne in mind that the authority of the court is strictly limited to determining the questions arising from this claim; it gets jurisdiction, but only for a particular purpose; no questions of local law can be determined; the action of the State court other than that of denying the right asserted is not reviewable; and,

although the most palpable errors appear upon the face of the record, yet, if the federal question has been rightly determined, the judgment cannot be reversed. Such is the rule clearly deducible from the limitations set upon the federal judiciary at its creation and preserved ever since, and such is the rule consistently laid down and acted upon in the decided cases. *Murdock v. City of Memphis*, 20 Wall. 590; *Bonaparte v. Tax Court*, 104 U. S. 592. The sole question then presented to the Supreme Court in the present case, the only question which it had authority to decide, the question on the determination of which alone the course to be pursued depended, was whether or not the courts of Illinois had wrongly deprived the petitioners of a right claimed and in fact secured to them by the Constitution of the United States.

The violation alleged of the rights claimed appears to have been twofold; that the statute under which the jury was selected was unconstitutional, and that the trial judge disregarded their rights. But while the petitioners claimed that the statute was unconstitutional and that the course of the trial judge was in violation of their rights, it does not appear to have been questioned but that Judge Gary's acts were simply in execution of the statute; no claim was made that its provisions were disregarded or disobeyed, and in no proper sense does any question as to its construction appear to have been raised. It might be that Judge Gary decided erroneously the matters which the statute referred to him for decision, and if the Constitution of the United States guaranteed the accused a correct decision, this error would be a violation of constitutional rights. As the case stood, therefore, the exact question was, whether the accused had rights under the federal Constitution which a statute like that of Illinois would violate or which an erroneous decision by the trial court in executing such a law would violate, and if so whether those rights were in fact violated.

The rights asserted were claimed to be secured by Articles 4-6, and Article 14, Sect. 1, of the Amendments. The real reliance, however, must be on the Fourteenth Amendment, for it has long been settled that the first ten amendments apply only to the federal government, and the argument that their provisions are now, by Article 14, made limitations on the several States, is shortly answered by the consideration that, as the only rights and immunities secured by them are to protection against the United States, they are, while properly described as privileges and immunities

of the citizens of the United States, incapable of being embodied as limitations on State authority or of infringement by the States, even in the absence of express prohibition. Those amendments stand, therefore, precisely as they have always stood; and any rights that were drawn in question must have been rights granted by the Fourteenth Amendment itself expressly, and not by any implied application by it of preëxisting provisions to new subjects.

To establish the claim of the petitioners two elements were necessary: first, the existence of the asserted rights; second, a violation thereof; and conversely to overthrow their claim it was sufficient to show that either one of these elements was wanting; to show that the constitutional provision had not the effect claimed, or that, even if it had, full force had been allowed it.

But a notable difference exists in the character of these two elements. The former is a question of the proper interpretation of the supreme law of the land, and as such within the field over which the highest federal tribunal reigns paramount; it belongs to that class of matters which the Supreme Court of the United States is expressly designed to settle, and for the settlement of which the humblest citizen in the most trifling cause, civil or criminal, arising within the boundaries of the nation, may appeal to it. The latter is a review of the action of a court in most respects wholly independent; a proceeding allowed only as an accessory to the former, and only in cases where the former is necessarily involved. In all questions of construing and interpreting the Constitution the Supreme Court is properly and wisely ordained the ultimate source of authority, and to it all such matters may be brought by appellate proceedings; but it has no power to correct errors committed by State tribunals within their respective jurisdictions, in other matters; and in cases brought before it by writ of error because involving federal questions, its right of review is only given as necessary to a decision whether the judgment rendered shall be reversed or affirmed. Its jurisdiction is limited to the determination of federal questions, and its power to rectifying errors committed in their determination below. It is cause of regret, therefore, that the court should pursue the course in disposing of such a case of assuming, for the purposes of decision, that a right under the Constitution exists, and of limiting its investigation to considering whether in that event the proceedings in the State court were in violation of it.

Such, however, was the course pursued in the present case, for Chief Justice Waite in his opinion declares that "Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the federal questions relied on in fact arise on the face of this record," the course of his opinion showing that by this he means whether there was any violation of the rights claimed; and he proceeds to show that "even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it," concluding by saying that "the federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record," again meaning that the action of the State courts shows no violation of the rights, if any such exist. The federal question must arise on the face of the record, in the sense of rights claimed under the Constitution having been asserted at the proper time as an objection to the action of the State courts, else the court would have refused the writ shortly on that ground, which would of itself be absolutely conclusive. And if arising so as to make necessary a further investigation of the record, it would seem that a more proper course might have been to decide whether the rights alleged existed; for if they did not, there was no occasion to act as censor of the State of Illinois and consider the manner in which its legislature had performed its duties. And if the alleged rights had no existence it was equally unnecessary to sit as a court of review, minutely studying the evidence on which the trial judge was satisfied that individual jurors were qualified under the State laws, — a matter as to which Mr. Justice Field, delivering the unanimous opinion of the court in *Hopt v. Utah*, 120 U. S. 430, a writ of error to a territorial court, and thus bringing up the whole record for review, pronounced the opinion of the trial judge conclusive. Both of these investigations are of matters as to which, so long as the national Constitution is not violated, the States are supreme and independent; and before entering upon such a field it would seem that the question of national law, to obtain a decision on which alone these writs of error are provided, should have been first settled, in order to avoid any semblance of unwarranted interference with the State's authority.

By the course followed, the constitutional question as to the



effect of the Fourteenth Amendment remains wholly untouched, and it may, therefore be worth while to examine briefly some of the considerations and authorities relative to it.

The first section of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Taking up the particular provisions of the amendment, two classes of restrictions are imposed, the one protecting the privileges and immunities of citizens of the United States, and the other ensuring to all persons due process of law and the equal protection of the laws.

The equal protection of the laws obviously requires, and has always been interpreted as requiring, only that all persons shall be treated alike without distinction, and cannot possibly be infringed by the nature of a proceeding to which all persons within the jurisdiction are equally subjected, or by a decision as to the facts in a particular case. If it were alleged that a law were disregarded it might be an assertion of a violation of this right, but a decision made in executing a law cannot be a violation.

It has never been asserted that the privileges and immunities protected were all those that a citizen of the United States might have ; that a privilege once created could never be affected by State action, as, for example, by that of the State creating it. It is only those that belong to a man because he is a citizen of the United States that are rendered inviolable ; but what these privileges are has been a subject of grave divergence of opinion. It was on this point that the Supreme Court was chiefly divided in the Slaughter-House Cases, 16 Wall. 36. The majority, concurring in the opinion of Mr. Justice Miller, seem to have thought that only privileges expressly created by the Constitution, more especially those political rights given by the Thirteenth, Fourteenth, and Fifteenth Amendments, were in question. On the other hand, Mr. Justice Field expressed the view, in which Mr. Justice Swayne concurred, that certain fundamental privileges and immunities, such as inhere in the citizens of all free States, rights akin to those referred to by Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. 371, were included ; and fol-

lowing out this line in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, he said, "It does not limit the subjects upon which the States can legislate. . . . It only inhibits discriminating and partial enactments, favoring some to the impairment of the rights of others" (p. 759). Mr. Justice Bradley alone appears to have gone further and regarded the amendment as securing a larger class of rights.

Prof. Pomeroy concludes that the restricted view of the majority was erroneous, and that, while not formally overruled, its soundness may well be doubted; but he states the object to have been "to afford the same protection to all persons as citizens of the United States against local oppressive laws, which the Constitution originally afforded to all persons in their character as citizens of the several States; Const. Law, 3d ed., p. 528, thus, like Judge Field, assimilating the provision to Article IV. Sect. 2, Cl. 1.

Perhaps the true test is that stated by Judge Cooley in his *Constitutional Principles*, p. 246, that "Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States." In the same work, p. 245, he says, "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of their respective governments." And he is of opinion that it may be doubtful whether the amendment has imposed any additional limitations on the powers of the States, a view in which that very discriminating foreign writer, Von Holst, in his *Constitutional Law of the United States*, p. 250, agrees.

In any aspect it seems clear that the amendment creates no new privileges and immunities as to judicial proceedings, except such as are included in the phrase "due process of law." If prior to the amendment the States were at liberty to try offences as they pleased, they are so still, so long as they act by due process of law. If prior to the amendment the Constitution contained no express limitation, and there was no inherent right to trial by jury, so that a State could, if it pleased, abolish that form of proceeding, that power remains, unless taken away by the express language of the amendment.

It has never been seriously asserted that formerly the States

were bound to proceed by jury trial. As said by Mr. Justice Field in the course of his dissenting opinion in *Neal v. Delaware*, 103 U. S. 370, a case not turning on this point, before the amendment no one would have doubted but that "it was competent for the States to dispense completely with juries, and to require all suits, civil and criminal, to be determined without their aid" (p. 405). See, also, Story's Commentaries on the Constitution, 4th ed., § 1947. Since, therefore, there was no privilege to trial by jury inherent in citizens of free States, such privilege, if any there is, must either be directly created by the Constitution or by the amendment in question.

It is almost needless to repeat here that the first ten amendments did not apply to the several States; and the fact that while it was deemed expedient to restrict the federal government the States were left free, is cogent to show both that there was no inherent right, else the federal government need not have been restrained, and that the States were meant to be at perfect liberty, as otherwise they would have been restricted also. Nor can it be contended that since citizens of the United States, when tried in federal courts, could claim this right, it was a privilege or immunity of such citizens, and therefore included in the phrase in the Fourteenth Amendment; for, if this right guaranteed by the Sixth Amendment has become a limitation on State authority, then equally has the right to be tried for felony only after indictment or presentment by a grand jury, and this latter proposition was expressly denied in *Hurtado v. California*, 110 U. S. 516.

It follows, therefore, that, if a right to trial by jury in criminal cases is guaranteed by the Constitution of the United States, it is solely by virtue of the requirement that no State shall deprive any person of life, liberty, or property, without due process of law.

Few more difficult questions have ever arisen than that of defining the phrase "due process of law;" indeed it may well be deemed impossible to frame a definition that shall cover all possible cases, and, as Judge Miller has said in his often-quoted opinion in *Davidson v. New Orleans*, 96 U. S. 97, . . . "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded" (p. 104.)

It has sometimes been intimated that the phrase, closely following, as it does, the language of Magna Charta, must be given the same interpretation, with the result that nothing would be due process unless it retained the forms in use at that time. On the other hand, it is obvious that a proceeding is not due process merely because sanctioned by legislative authority.

The rule is best stated in the language used by Daniel Webster in the Dartmouth College Case: "By the law of the land [the phrase used in Magna Charta] is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land." 5 Works, 7th ed., pp. 487, 488. This is cited by Von Holst as the sound doctrine, and, in accordance with it, he declares that the prohibition applies only to the most general principles, viz.: "that no one shall be convicted unheard; that the facts alleged must be examined into; and that a decision shall be made only after a legal trial of the facts in a court of competent jurisdiction." Constitutional Law, pp. 252, 253.

The question naturally suggests itself whether this provision necessitates a trial by jury; whether the right to this form of trial, unquestionably secured in prosecutions in the federal courts, is, by the Fourteenth Amendment, equally guaranteed in the State courts.

This point appears never to have been decided by the Supreme Court of the United States in respect to criminal cases. In *Walker v. Sauvinet*, 92 U. S. 90, the court held that in a civil action a jury trial was not essential to due process. Yet that the right to a jury in civil cases was regarded as of great importance is plain from the Seventh Amendment, which preserved the right in the federal jurisdiction, when the matter in dispute was more than twenty dollars; and under the constitutional provision now in question no ground for distinction in this respect,

between civil and criminal cases, is perceived, since deprivation of life, liberty, and property are classed together.

While there is no express decision, indications are not wanting of the opinion of the court that in criminal as in civil proceedings it is within the discretion of each State to regulate the matter for itself. Such was understood by Mr. Justice Harlan, dissenting, to be the effect of the opinion given in *Hurtado v. California*, *supra*; and in *Ex parte Virginia*, 100 U.S. 339, and *Neal v. Delaware*, 103 U.S. 370. Mr. Justice Field supported his dissenting opinions by arguments founded on the power of the several States prior to the Fourteenth Amendment to have abolished jury trials, and declared that that power still existed. It is worthy of note, also, that in *Strauder v. West Virginia*, 100 U.S. 303, Mr. Justice Strong referred the right of trial by jury to the State, and not to the National constitution. So, too, in *Missouri v. Lewis*, 101 U.S. 22, Mr. Justice Bradley, who in the Slaughter-House Cases evinced a disposition to carry the effect of the amendment further than any other member of the court, observed: "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory." "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right." 101 U.S. 31.

The last sentence clearly implies that trial by jury is not a requisite of due process of law, for it is to be borne in mind that, in relation to the federal Constitution, what is due process of law in one State will, if actually sanctioned by the local laws, be so in another. It cannot be made legal to try a criminal without a jury in California if it cannot equally be made legal in Maine. The right to due process of law is a national right, and must conform to a national standard; a form of proceeding does not meet that standard merely by virtue of its having been in use in a particular State prior to the creation of the right. No one has ever contended that the amendment was to crystallize the procedure of each State as it was found when the amendment became operative. If due process rested on the actual practice then pre-

vailing, it was "due" simply by virtue of the expressed sense of the legislature of each State, and there is no ground for saying that the sense, as then expressed, was taken, as to each State, as an immutable standard, or that a subsequent expression would not have as great effect. The United States Constitution gives its protection to every person as viewed from the national standpoint, and when it establishes a right, State lines disappear, and the measure of that right must be the same wherever, within the Nation's boundaries, it is called in question. It may be fearlessly asserted that if one State can lawfully proceed to try a criminal in a certain way, any other State may, in the discretion of its law-makers, do the same, although that mode was adopted by the one before, and by the other after, the Fourteenth Amendment became the law of the land.

The foregoing expressions of the Supreme Court and of its individual members seem, therefore, to point clearly to the conclusion that the provision in question does not necessitate a trial by jury. This opinion is confirmed by the authority of Judge Cooley, who, in his edition of "Story's Commentaries on the Constitution," says that, so far as the first ten amendments are concerned, "The States, in the enforcement of their own laws for the preservation of peace and order, may dispense with the grand jury if the legislature shall so provide; and they may make all State offences triable before a single judge, instead of by a jury, if that mode of trial shall be thought most politic or most conducive to justice. And no more under the fourteenth article than previously can the federal government interfere with the mode prescribed for the trial of State offences: whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no provision of federal or State constitution." § 1947.

But it may be urged that although trial by jury is not required, trial by a partial or biased jury is prohibited; that trial by any legally authorized and impartial tribunal may be due process of law, but that trial by a body prepossessed against the accused would not be.

This argument is not without force; while the sound discretion of legislators may deem it expedient, and equally or better calculated to secure justice, that a single judge or a bench of judges should decide all criminal cases rather than a jury, and may, by the

powers vested in them, so ordain without infringing any of those fundamental principles of right which make up due process of law, it may, notwithstanding, be true that a system which should give the decision to a body already biased, which in effect should oblige one accused of crime to plead his cause before those who had already prejudged him, would violate those fundamental principles.

It cannot, however, be asserted that on this account every trial in which the jury was not wholly impartial would fail of being due process. Such a provision as the one in question is aimed at the system, and not at the administration of it. It may well be that a State can deprive of life, liberty, and property through its judicial officers as well as through its legislative or executive branches, and if a State court should give a judgment illegal for want of jurisdiction, or kindred cause, it might be a matter cognizable and remediable by the Supreme Court; but if the State creates a system of procedure which offers protection from a partial jury, a system wholly in accord with the Constitution of the United States, and if the State courts administer justice in accordance with that system, select a jury pursuant to the rules there laid down, try the question of partiality by the methods prescribed, surely it can never be said that there has not been due process of law simply because opinions may differ as to the effect that should be given to certain of the evidence introduced to test the incidental question of partiality. Under no other section of the Constitution is provision made for overturning the decisions of the State tribunals for error unless the error is committed in the decision of a question as to the effect of the federal Constitution or the federal laws; in no other class of cases brought before it from a State court for review can the decision of a question of fact or of general law be made the basis for reversing the judgment; a State court may pronounce a contract invalid for any reason except the subsequent enactment of a statute impairing it, and although the decision may be deemed manifestly erroneous it stands as final and subject to no review. *Bethell v. Demaret*, 10 Wall. 37. The protection of an appeal to the Supreme Court of the United States is elsewhere limited to the correction of erroneous decisions of purely federal questions, and no attempt is made to supply a safeguard against errors, or even against corruption, in the State courts in other matters; yet, under this section

of the Fourteenth Amendment, efforts are made to have the entire record from the State court overhauled. Very pertinent is the language of Judge Miller in the opinion already quoted, where, speaking of this same provision, he said: "In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." 96 U.S. 104.

It was said in rendering judgment in *Walker v. Sauvinet*, *supra*, where the right to a trial by jury in a civil case was claimed to be guaranteed by the Fourteenth Amendment: "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, — that is to say, with the Constitution and laws of the United States made in pursuance thereof, — or with any treaty made under the authority of the United States. Art. 6, Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." And in like manner in a criminal case, is it not true, if the State court has decided that the proceedings were in accordance with the law of the State, and that law by providing for an impartial jury has fulfilled the requirement providing for due process of law, that the court in ascertaining that the State law does so provide has discharged its mission of enforcing proper obedience to the Constitution of the United States?

Every system of procedure rests ultimately on the proper discharge of their duties by persons selected for and intrusted with the performance of those duties. The most that can be done is to secure to all persons a right to have the performance of their duties by inferior officers, ministerial or judicial, reviewed by those of a higher grade. The proper working of the most skilfully devised system will still rest ultimately on the fidelity to their trusts of certain individuals. Thus, in the selection of a jury, it is necessary that the decision as to whether an individual summoned as a



juror is or is not disqualified by partiality should be placed on some person or persons, and the best that can be done is to make a judicious selection in imposing the duty. Whether the matter be left to the discretion of the trial judge, as in Illinois, or be left to triers, according to the old practice, it will still, like other questions of fact or of mixed law and fact, be liable to erroneous decisions, and oftentimes equally discreet persons might differ in opinion as to whether bias was shown sufficient to disqualify or not. Shall it then be said that the whole matter is to be taken up to the Supreme Court of the United States, and that body be called upon to determine whether the evidence on *voir dire* as reported shows too much bias, on the ground that if it does, the accused was not given due process of law?

It is impossible to suppose that by these words is meant a correct decision of this or any other incidental question. Due process of law by a State in depriving a person of life, liberty, or property can only mean and must be taken to mean in this connection the establishment of such a system of procedure as provides for a fair trial; and if such a system is provided and acted upon by those who are intrusted with the duty, there will be no failure of due process, in the constitutional sense, although there may be a failure of justice. It consists not in reaching a right conclusion absolutely, not in trying a man by a jury utterly impartial, if partiality is in question, but in supplying the means, working as we must through human agencies, of attaining the right result; and if there is a failure owing to the defectiveness of the agencies, it is no more than often happens. Equally well might failure of a jury to arrive at the truth be deemed a lack of due process, as an error of the trial judge in determining the questions submitted to him. Neither State nor Nation can ensure that errors will not occur; and if the State has made such suitable provision as it deems best to prevent or correct errors, and has allowed the accused the benefit of those provisions, it has acquitted itself of its duties towards the nation and towards the man, and having granted him a fair opportunity for a fair trial has done all that was required.

Indeed there is much reason for the contention that the prohibition of the Fourteenth Amendment applies only to legislative action and perhaps to questions of jurisdiction. Mr. Justice Field, speaking of it in *Neal v. Delaware*, *supra*, said: "That is a provision found in all our State constitutions from the origin of the

government, and is intended to protect life, liberty and property from arbitrary legislation." Those cases which arose under the civil rights legislation, concerning the exclusion of negroes from juries when the accused was a colored person, if they are still to be regarded as law, must be deemed rather cases of denying the equal protection of the laws, since there the juries were not drawn professedly in accordance with the State statutes. No case has been found going to the extent of saying that action of a State court in professed obedience to a constitutional law and making no discrimination of race or color can be assailed as a violation of the Fourteenth Amendment. The statute to be applied unquestionably may be, and its constitutionality is to be determined ; but the acts of the State tribunals, it is believed, so long at any rate as they do not repudiate the statute, cannot be impeached. Thus where the question was whether a man had been deprived of an office without due process of law by proceedings under a State statute, it was said: "It is substantially admitted by counsel in the argument that such is not the case, if it has been done, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. We accept this as a sufficient definition of the term 'due process of law,' for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." *Kennard v. Louisiana*, 92 U. S. 480, 481.

The ultimate question really is whether, by the Fourteenth Amendment, the Supreme Court of the United States is vested with authority to review the decisions of the State courts in all matters, criminal and civil, to determine whether State laws have been correctly interpreted and enforced. If due process of law depends upon the correct determination of facts or issues arising in the enforcement of local statutes, then in every case it becomes a federal question,—that is, a question arising under the Constitution and laws of the United States,—whether those facts and issues have been rightly found. If, such a question being brought before it, the court, by virtue of its duty to see that the Constitu-

tion is obeyed, is required or empowered to determine the soundness, in fact or law, of the decision of the State court, then in every case a separate investigation must be made by it of the proceedings appealed from ; and it will not be bound to follow the State decision, although the latter was on a point of local law. And if an alleged error of Judge Gary, in being satisfied that the jurors Sanford and Denker were not disqualified under the jury law of Illinois, would give the Supreme Court of the United States a right or a duty to consider in detail the examinations of those jurors, in order to determine whether he was properly so satisfied, and empower it to reverse his judgment and that of the Supreme Court of Illinois, on being convinced that he was in error, as the course of the court seems to indicate, then the Fourteenth Amendment has given the Supreme Court jurisdiction on writ of error to the State courts practically in all cases ; a jurisdiction wholly unshackled by the limitations imposed in cases coming from the inferior federal courts.

It is preposterous to attribute any such sweeping effect to the amendment. That amendment was adopted under special circumstances, and chiefly, at any rate, to secure a special object,—the establishment of the enfranchised negroes of the South on a basis of equal rights with other citizens. It may be that a broader object was also in view ; that, as said by Mr. Justice Bradley in the Slaughter-House Cases, *supra*, it was aimed at the spirit of insubordination to the national government that had been displayed ; but, without restricting it to its effect in securing to the negroes their newly-granted equality, it is not improper to consider in construing it what its immediate purpose was.

Nor are the same principles of interpretation to be followed where a provision of the organic law is in question that prevail in determining the effect of a private instrument. The spirit must be followed rather than the letter, and that construction adopted which shall do most towards harmonizing the whole. The mere literal meaning of the words is not to be given undue importance, but the pervading sense of the whole is to be kept in view. When Chief Justice Marshall, the creator of American constitutional law, found authority for Congress to charter the Bank of the United States, he was not guided solely by the written words of the Constitution. The right to issue a paper currency is not contained expressly in any grant of powers. The conclusions reached

in *McCulloch v. Maryland* and *Jaillard v. Greenman* are attained by considering the Constitution in its entirety, and interpreting it in a broad spirit calculated to give it effect as an entirety. And in like manner, when the other scale is uppermost, when it is a question, not of curtailing the national government in the functions of nationality, but of abridging the independence of the several States in the functions of local government, the same spirit should prevail; and unless a breach in the symmetry of the Constitution is clearly intended, in determining which the circumstances attending the adoption of an amendment are significant, the construction should be adopted, as far as possible, which will fit into and fill out the body of the instrument rather than violently disrupt it.

Thus, in considering the force and effect of the Fourteenth Amendment, the mere ordinary import of the words used is not to prevail exclusively; it cannot be disregarded, indeed, but it should be made to a large degree subordinate to the spirit, keeping in view the particular ends designed to be corrected, and the connection with the rest of the Constitution.

The fundamental plan of our scheme of government is the dual sovereignty of the State and of the Nation. Certain fields have been assigned to each, and, without destroying the very framework of the system, neither can be largely encroached upon. The great prevailing idea is that of local self-government coupled with a nationality complete in all things pertaining to the people as a whole. The due administration of its laws, free from control or supervision, was carefully preserved to each State, so long as its laws concerned its internal affairs and government only, and violated none of the fundamental rights specified, beside which may well and properly be classed the right not to be oppressed by arbitrary legislation. But it was never designed that the State administration of justice should be reviewable by the federal courts for the purpose only of correcting errors committed as to matters pertaining to the State, or of enforcing obedience to State laws. Unless, therefore, the intention is plain, no construction should be given that will disturb this fundamental division of powers, and overturn the local independence.

So far from such a construction being required, there seems to be nothing in the language or spirit of the Fourteenth Amendment warranting it; and this is further supported by the history of its

adoption. It can hardly be supposed that this part of the first section, if designed radically to alter the distribution of powers, would have passed through Congress almost unnoticed. Yet such is the case; while Charles Sumner, and Henry Wilson, and other leading statesmen of the period were hotly disputing over other provisions, this one was allowed to pass wholly undiscussed, and almost unmentioned. If its effect was only to reënforce provisions already found in most, if not all, of the State constitutions, to prevent wilful violations by legislation of certain principles of fundamental justice, which, except under the influence of popular passion, would never be violated, while an important development, it would not be a wide departure, and its failure to attract attention is readily understood.

That such is the proper interpretation is deducible alike from the spirit that pervades it, from its relation to the body of the Constitution, and from the decisions as to its effect. There is no indication in the amendment itself that it was designed to enlarge the jurisdiction of the federal Supreme Court by imposing the requisite of due process of law on the part of the States, and it is indeed fairly inferable from the language used that the chief object was, as stated by Judge Cooley (*Constitutional Limitations*, 5th ed., p. 359, note 3), to preclude legislation. In this sense only is it an outgrowth of, rather than an excrescence upon, the original instrument. And although a few expressions may be found in the reports suggesting that it has a more sweeping effect, no case has yet gone so far as would be required in order to say that any part of the proceedings in the *Anarchists' Case* was within the scope of the amendment, or that anything in the case except the validity of the jury law of Illinois would fall within its purview.

The intensity of the struggle to preserve nationality and the difficulties of the reconstruction period have created a tendency to look upon the national government as the source of protection in cases where personal rights are concerned, even when they are rights granted by the States themselves, and guaranteed by their constitutions. In avoiding the perils of dissolution, the not less perils of too great centralization have come to be disregarded, and a latitudinarian spirit of construction would obliterate the landmarks set by the founders of the nation, and erect upon the basis of the Fourteenth Amendment a new judicial system with the Su-

preme Court at Washington as a final court of appeal from all tribunals, state and federal.

But although the Civil War has decided, more effectively than any judicial opinion, that we are a nation, and the amendments growing out of that great epoch have provided that citizenship in the nation shall not depend on race or color, and that there shall be no discrimination between citizens by a State, it has not yet been decided or provided that the independence as to local matters, which forms the strongest bulwark against that disintegration so often predicted, has ceased, and that the State in the administration of its laws is to be subjected to the surveillance of the national courts. And it is to be deplored that the Supreme Court of the United States, upon which chiefly rests the responsibility for preserving the proper relation of dependence and independence between things national and things local, should have adopted a course which may tend to countenance such an idea.

*William H. Dunbar.*

CAMBRIDGE, MASS.

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## A CREDITOR'S RIGHT TO HIS SURETY'S SECURITIES.

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THE question for discussion is whether a debtor can pledge his property so as to indemnify his surety, without giving the creditor a preferred claim on the indemnity fund. In such a case it is not contemplated that the surety shall pay the debt out of the security in the first instance, but if through default of his principal he should be obliged to pay out of his own property, it is intended that he shall have recourse to the fund for reimbursement. One must distinguish carefully between three classes of cases: first, those in which the security is given primarily for the better protection of the debt; second, those in which the surety has the power, though not the duty, to apply the security in discharge of the debt; third, those in which the security is given merely for the purpose of indemnity. In the first class there can be no question that the creditor has the rights of any *cestui que*

*trust*; in the second, the rights of the creditor must be worked out, if at all, by a proceeding in the nature of an equitable trustee-process. These two classes we propose to exclude altogether from this discussion; our attention will be turned solely to those cases in which the security is given purely for indemnity.

The result will frequently be the same whether the security be applied in discharge of the debt, or whether it be retained for reimbursement; this is true where the surety is solvent and where the indemnity fund is equal in amount to the debt, but it will be readily seen that in case of insolvency or bankruptcy it makes a great difference whether the creditor be allowed to reach the security directly or whether he be obliged to rank with the general creditors.

The question has been frequently before the courts both in this country and in Great Britain, and various results have been reached which cannot be reconciled. It is proposed to consider the cases under the following four heads, which, it is believed, will be found to comprise most of the decisions: first, where the security for personal indemnity is held to constitute a trust fund for the payment of the debt; second, where the equity of the creditor does not arise until the insolvency of the surety; third, the English cases, following the rule of *Ex parte Waring*, that in the event of double bankruptcy the creditor may reach the security; fourth, the Scotch decisions, according to which the holder of the obligation has no claim to the security, though indirectly he may, in common with the general creditors, derive a benefit from its existence.

The first case on record is that of *Maure v. Harrison*,<sup>1</sup> in which it is stated that "a bond creditor shall in this court have the benefit of all the counter-bonds or collateral securities given by the principal to the surety; as, if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt." This case has remained a solitary decision in England, and is at variance with *Ex parte Waring*.<sup>2</sup> The doctrine as it stands, without qualification, is that all securities given by a principal to his surety are held in trust; the case was so interpreted in New York,<sup>3</sup> at an early period, and may be said to lie at the basis of most of the

<sup>1</sup> 1 Eq. C. Abr. p. 93.

<sup>2</sup> 19 Ves. 345.

<sup>3</sup> *Moses v. Murgatroyd*, 1 Johns. Ch. 119.

American law on this point. The reasons given by the courts for deciding that this transaction creates a trust, even where the funds are given for the surety's indemnity alone, are, to say the least, unsatisfactory; but the statement is generally made that, in accordance with a settled principle in equity, securities in the hands of sureties enure to the benefit of creditors, though in carrying out this principle the intention of the parties be entirely disregarded. In this view of the case it goes without saying that assent or knowledge on the part of the creditor is not necessary to perfect the trust; the transaction being for his benefit, his assent will be presumed.<sup>1</sup> It is as though the debtor had originally constituted the surety a trustee of funds with which to extinguish the debt when it became due, whereas the real object doubtless was to gain credit for the bond, note, or other obligation through the name of the surety, and at the same time leave him with the means of protection. True, the principal intended his debt should be paid, but it was to remain merely a personal claim against himself or his surety, and not to become a claim against any specific fund. The security is for indemnity against any loss the surety may incur on the credit given his principal. No holder is named as beneficiary in any contingency; the instrument is negotiated alone on the personal credit of the parties. Now, if a trust is created, it must be either express or constructive; if the former, it would appear from the language or intention of the parties; if the latter, it must be in order to accomplish justice. But there is nothing in the phrase "to indemnify the surety" from which to infer an express trust; and should the security, on the other hand, realize less than the debt, it is clear that if the creditor is allowed to appropriate it and then claim against the insolvent estate for the balance, the latter may be left without any means of reimbursement. This fact is in itself sufficient to negative the idea of a constructive trust, based on any principle of justice.

Frequently an analogy is drawn between the case we are now discussing and that of a creditor whose remedies against the principal debtor are transferred to a surety who has paid the debt.<sup>2</sup> In answer to this argument it is sufficient to say that in the latter case payment by the surety extinguishes the creditor's claim, and what he petitions for is a substitution to the creditor's remedies against

<sup>1</sup> *Baltimore & Ohio R.R. v. Trimble*, 51 Md. 99, at 114; *Moses v. Murgatroyd*, *supra*.

<sup>2</sup> 1 St. Eq. Jur. § 638.



the principal debtor; in the former instance there can be no question of substitution proper, for the receipt of the surety's securities by a creditor does not relieve the surety from liability in case the securities prove insufficient. The relief by substitution is never extended but on the assumption that the debt has been or is to be paid in full, so that further detention of the security is against equity.<sup>1</sup> Another objection to allowing substitution is to be found in the fact that, the security being for the indemnity of the surety, he has no right to it till he has been damnified by payment; the creditor's remedies against the principal debtor, on the other hand, ripen as soon as there has been a refusal to pay. By subrogating the surety to the creditor's remedies against his debtor, the burden is finally placed where it belongs, and therein lies the equity of the transaction. No such object is attained in doing the converse of this, the only result of which is to place the creditor in an advantageous position to which he can lay no claim. The burden in the latter case is not always placed where it belongs: if the securities are sufficient in value, the burden will take care of itself; if they are insufficient, the loss, as has already been stated, will fall, in part at least, on the surety.

The case of *Morrill v. Morrill*<sup>2</sup> affords a good instance of the common American doctrine. There an infant's guardian executed a mortgage as security to a surety on his bond. It was held that the infant was entitled to its benefit for the amount due from the guardian. The language of the court is as follows: "When an assignment of securities is made by the principal to the surety for indemnity merely, an implied trust is raised in favor of the creditor, which he may enforce on the maturity of the debt, whether the surety has been damnified or not, and whether the surety or principal, either or both, are insolvent. The assignment of the security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt for which he is holden. The surety has a right to apply the security directly to the debt. If the surety pays with his own funds, he keeps his principal's debt on foot against him and then applies the security to its payment. Thus in any event the funds of the principal are made to satisfy the principal's debt, and this accords with the purpose of the principal when he gave the security. If the surety after assignment becomes

<sup>1</sup> *Lawson v. Snyder*, 1 Md. 79. See also in this connection *Bispham's Equity*, § 335.

<sup>2</sup> 53 Vt. 74, and cases cited.

insolvent or is discharged from liability, he holds the fund in trust for the creditor."<sup>1</sup>

In *Re Jerome B. Fickett*<sup>2</sup> the statement is made that there can only be complete indemnity by applying the security in payment of the debt; how this will be accomplished in the case of a deficiency in the security, the court do not undertake to say. If, for instance, the debt is \$1,000, and the value of the security only \$500, the surety will have to pay at least a part of the remaining \$500 out of his own pocket. He will not only have to forego reimbursement from the security, but he will also be deprived of any remedy against his principal on account of the rule against double proof.

If we hold that in indemnifying the surety the principal creates a fund for the payment of the debt, two consequences follow: first, we preclude the former from ever relinquishing the security, even before insolvency and before the creditor has learned of its existence; second, we render any set-off in favor of the principal impossible. With regard to the first point there seems to be very little authority aside from a strong dictum in the case of *Ijames v. Gaither*.<sup>3</sup> As to the second point, there appears to be no authority at all. Though these two consequences are the logical and inevitable result of holding that a trust is created, it may nevertheless be doubted whether a court would not in an actual case shrink from these applications of their principle. If this be true, it is obvious that the word "trust" is used in a vague and inaccurate sense, and it follows, as we shall soon see, that there is no real distinction between the cases we have been discussing and those comprised under the next head.

In the second class of decisions the right of the creditor to the security is held to arise on the insolvency of the surety, but not before, and a result of this view is that until insolvency intervenes the surety may release the security if he sees fit. This doctrine

<sup>1</sup> See to the same effect *New Bedford Inst. for Savings v. Fairhaven Bank*, 9 Allen, 175; *Kelly v. Herrick*, 131 Mass. 373; *Vail v. Foster*, 4 N.Y. 312; *Barton v. Croydon*, 63 N. H. 417; *Harmony v. National Bank*, 13 W. N. (Penn.) 117, n. 1; *Re Jaycox*, 8 B. R. 241; *Ex parte Morris*, 16 B. R. 572; *Re Peirce*, 2 Lowell, 343.

<sup>2</sup> 72 Me. 266.

<sup>3</sup> 93 N. C. at 363: "We think it clearly to be gathered from the authorities that as soon as such a deed of indemnity is given, the equitable right of the creditor attaches to it, and it is not within the power of the surety to put it beyond the reach of the creditor."

has obtained in a long series of cases in Connecticut, and as illustrating it we will refer briefly to a few of the more important ones.

In *Thrall v. Spencer*<sup>1</sup> the surety had parted with the security before his insolvency to the defendant, from whom the creditor sought to recover it, but the court held that the release was good. "The mortgage was not made to the holders of these notes, but to the accommodation indorser for his security." "He (the indorsee) has lain still until the latter (the indorser) had parted with possession. . . . He therefore comes too late for relief." And again: "The latter (the indorser) may well relinquish his pledge, provided he acts in good faith and without any fraudulent design before any claim is made on him for the property."

In *Lewis v. Deforest*<sup>2</sup> an accommodation indorser retained on his insolvency a portion of the funds given him for his indemnity, and the court held that the unpaid indorsee might have the latter applied in discharge of the debt. Both principal and surety were insolvent, but the decision is in no sense dependent on the former fact. In this case another point of interest was passed upon. The indorser had from time to time taken up notes to an amount greatly exceeding the value of the security, which gave him the right to appropriate the latter to reimbursement and to add the amount so received to his general assets; but since he had failed to do so before insolvency, his estate was only allowed to claim against the security in competition with the note-holders, whereby the general creditors were prejudiced. See also *Moore v. Moberly*:<sup>3</sup> "To the extent that payment has been made by a surety, he would be entitled to occupy the place and enjoy the rights of a particular creditor, receiving his *pro rata* share of the indemnity and leaving the residue of his payment as a loss to be borne by himself." Such a disposition of the mortgaged property can hardly have been contemplated by either party to the original transaction, nor is it fair under the circumstances that the note-holders should be paid at the expense of the other creditors of the surety.

In *Homer v. N. H. Savings Bank*<sup>4</sup> it appeared that the surety was indebted to his principal in an amount greatly exceeding the value of the securities given him for his indemnity. It was held

<sup>1</sup> 16 Conn. 139.

<sup>2</sup> 20 Conn. 427.

<sup>3</sup> 7 B. Mon. 299, 301. To the same effect are: *Ray v. Proffet*, 15 Lea, 517; *Ijames v. Gaither*, 93 N. C. 358; *Kelly v. Herrick*, 131 Mass. 373. See also Mr. Willard's article in 14 Am. L. R. at 857.

<sup>4</sup> 7 Conn. 478.

that the creditor's rights could be no greater than those of the surety, and that consequently the former would take the securities, if at all, subject to the same set-off which was good against them while in the hands of the latter.

The doctrine of the Connecticut cases will be found to exist with slight modifications in several other States.<sup>1</sup> The rule in Ohio seems to be that where the surety's liability has been fixed by judgment and his principal has become insolvent, a court of equity will permit the creditor to proceed directly to appropriate the securities to the payment of the debt. "It prevents circuity of action, the surety is better indemnified, not being disturbed, unless his securities are insufficient, and the creditor has the benefit of having his claim satisfied."<sup>2</sup>

Why an equity should be held to arise in favor of the creditor on the insolvency of the surety is not quite clear. The latest Connecticut case<sup>3</sup> states particularly that the mortgage is both in effect and form for indemnity. That being so, is there any justice in saying that on the insolvency of the surety the right of his estate to indemnity suddenly ceases, merely because a particular creditor may otherwise have to forego full payment, or because he himself may no longer have control of his property?<sup>4</sup>

It is believed that the doctrines most prevalent in this country touching the right of a creditor to the securities held by his surety for his personal indemnity have been referred to,<sup>5</sup> and it is now proposed, thirdly, to consider the English decisions, the leading one of which is *Ex parte Waring*.<sup>6</sup> This case is at variance with the earlier one of *Maure v. Harrison*, and has undoubtedly settled the law of England on the question now before us. The rule of *Ex parte Waring* is that where both principal and surety are bankrupt, the creditors can claim the benefit of the securities. The facts of the case were briefly these: Brickwood & Co. had ac-

<sup>1</sup> *St. Louis Ass'n v. Clark*, 36 Mo. 601; *Logan v. Mitchell*, 67 Mo. 524; *Stone v. Furber*, 22 Mo. App. 496; *Constant v. Matteson*, 22 Ill. 546.

<sup>2</sup> *Ohio Insurance Co. v. Reeder*, 18 O. Rep. 35.

<sup>3</sup> *Jones v. Quinnpiak Bank*, 29 Conn. 15.

<sup>4</sup> In Alabama the creditor is substituted to the rights of the surety, to relieve the latter from the vexation of a suit and from having to resort to the security for redress. *Toumlin v. Hamilton*, 7 Ala. 362; *O. Insurance Co. v. Ledyard*, 8 Ala. 866; *Saffold v. Wade's Ex.*, 51 Ala. 214; *Daniel v. Hunt*, 77 Ala. 567.

<sup>5</sup> The Mississippi cases will be mentioned in connection with the Scotch cases under head four.

<sup>6</sup> 19 Ves. 345; 2 Rose, 182, S. C. See also Eddis, Rule of *Ex parte Waring*.

cepted bills of Bracken & Co., and had received from the latter securities against their acceptances. First Brickwood & Co., then Bracken & Co. became bankrupt. The holders of acceptances had proved their debts under both commissions, and the assignees of the drawers' estate sought to recover from the acceptors such surplus as would remain from the proceeds of the securities after payment of the dividends due the several bill-holders. The latter petitioned to have the funds applied in discharge of the acceptances on the ground that they were held not merely for the personal indemnity of the acceptors, but for the ultimate payment of the bills. The court, while emphatically denying that the bill-holders had any personal claim to the securities, decide that where two bankrupt estates are being administered, since it would be inequitable for the one to keep the securities and equally inequitable for the other to get them back (as the latter only had a right to them on tendering their value or on relieving the acceptors' estate of all liability), the only way to adjust the equities between the two estates is to order the one in possession of the securities to apply them in discharge of the bill-holders' claims. "Accidentally another person gets an advantage for which he had not stipulated, by reason of the adjustment of equities between the parties."<sup>1</sup>

In order to bring a case within the rule of *Ex parte* Waring, the contract between the drawers and acceptors must be still in existence and incapable of alteration. Hence if only one of the parties be bankrupt, and the other's estate, though insolvent, has not been brought under any forced administration, the rule does not apply.<sup>2</sup> "Where there is no right of double proof, whatever may be the equities as between the two firms that are insolvent, I cannot see how there can be any difficulty in settling those equities between the parties without the necessity of giving to the bill-holder, who is simply a creditor without any security, the security which he has never bargained for."<sup>3</sup> The case of *Powles v. Hargreaves*<sup>4</sup> shows that the two estates need not be bankrupt in the technical sense, but that the rule is properly invoked where they are being wound up through the medium of a court of chancery. It is there also expressly decided that the rule applies, whether the secu-

<sup>1</sup> *Ex parte* Smart, 8 Ch. App., at 225, per James, L. J.

<sup>2</sup> *Ex parte* Lambton, 10 Ch. App. 405; *Ex parte* South Am. Co., 10 App. C. 635.

<sup>3</sup> *Vaughan v. Halliday*, L. R. 9 Ch. App. 561, 568, per Mellish, L. J.

<sup>4</sup> 3 De G., M. & G. 430.

rity be more than sufficient or insufficient to meet the acceptances. In the latter case the bill-holders may prove for the deficiency (p. 452).

The rule laid down in *Ex parte Waring*, though of easy application, is technical in its nature and unsatisfactory in its results, for in case of a deficiency in the security the acceptor's estate has no means of indemnifying itself for the amount paid on the subsequent proof. Thus, the very object for which the security was given is defeated. Then, again, the court admit that the bill-holders have no claim to the security through any right inherent in themselves, and yet it is ultimately handed over to them. If the creditors have no right to it, it would seem wrong that it should enure to their benefit to the prejudice of another. It is a confession of weakness on the part of the court to be driven to such a result, and that the problem admits of another solution is, we think, amply demonstrated by the case of *The Royal Bank of Scotland v. The Commercial Bank of Scotland*,<sup>1</sup> which brings us to the fourth and last subdivision of our topic.

According to the Scotch rule the surety has no right to the security except to indemnify himself for payments actually made, nor have the bill-holders any direct claim, though both principal and surety are insolvent; but if the surety's estate pays a dividend for which it is reimbursed out of the security, a new general asset is created; thus, incidentally, in the winding up of the surety's estate, all the creditors derive a certain benefit from the indemnity fund.<sup>2</sup> Whatever may remain of the latter goes back to the principal's estate.

The facts of the Scotch case just mentioned were as follows: By agreement between A and B the latter undertook to employ his works in spinning yarns. All material at B's works was to continue A's property subject only to B's lien for advances made by him. A and B became bankrupt. B was liable as acceptor

<sup>1</sup> 7 App. 366.

<sup>2</sup> The same rule obtains in Mississippi. *Poole v. Doster*, 59 Miss. 258. In studying the earlier cases (*Bibb v. Martin*, 22 Miss. 87; *Bush v. Stamps*, 26 Miss. 463; *McLean v. Ragsdale*, 31 Miss. 701; *Carpenter v. Bowen*, 42 Miss. 28; *Osborn v. Noble*, 46 Miss. 449) it must be constantly borne in mind that they are of three kinds, viz.: *First*, Where the security is given to secure payment of the debt. *Second*, Where the surety has a power to sell the security and apply the proceeds in discharge of his obligation as soon as his liability has become fixed. *Third*, Where the security is given merely for the surety's indemnity. The remarks about subrogation only apply to the first two classes.

on bills drawn by A to the amount of £16,000, and he held goods belonging to A of the value of £4,000 as a security against his acceptances. The bill-holders claimed that the proceeds of the goods should be applied in payment of the bills, so as to reduce the amount of their proof against the two estates to £12,000. B's trustees, on the other hand, contended that the bill-holders would have to prove against both estates for the full amount, and that all dividends paid from B's estate should be repaid from the security. The court in an elaborate opinion refused to follow the rule laid down in *Ex parte* Waring, the benefit of which was claimed by the bill-holders, on the ground that in many cases it failed to indemnify the acceptor's estate, and that it distributed the drawer's property in a manner which he had never contemplated.

It will be of interest to compare the different ways in which the general creditors of both estates will be affected according as the English or the Scotch rule is applied. Let us suppose the liabilities of drawer and acceptor to be £100,000, and their assets to be £50,000; let us assume further that the bills outstanding amount to £5,000, and that the securities in the hands of the acceptor are worth £2,000; then by the rule of *Ex parte* Waring the bill-holders would receive £2,000 and be allowed to prove against the two estates for £3,000, obtaining from each £1,500. Thus they would collect in all £5,000, or exactly what was due them. The assets remaining in the hands of the acceptor and drawer would in either case be £48,500. By the Scotch rule the bill-holders would also recover £5,000 by proving against the two estates, but in this instance, after payment of the bills and reimbursement from the securities, the acceptor's assets would be £49,500 and the drawer's only £47,500. In other words, the acceptor's estate would in the first case be subjected to a loss of £1,500 and in the second to a loss only of £500. As the securities were given to save the acceptor harmless, it is evident that the latter result is the one most in keeping with the intention of the parties. It is only just that the drawer's estate should be made to pay its own debts, and not place the burden of them on the acceptor's estate.<sup>1</sup>

It is always for the advantage of the general creditors of the ac-

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<sup>1</sup> The figures used with reference to the English rule apply equally to the general American rule in cases where both principal and surety are insolvent. The above dividends, taken individually, may be only approximately correct. Their exact amount will depend on whether proof is made against the two estates concurrently or separately.

ceptor's estate that the Scotch rule be followed, for though the amount of proof be thereby increased, yet by resorting to the securities the estate can reimburse itself frequently to the full extent of payments made. No such rule can be laid down with regard to the creditors of the drawer's estate. In the above illustration it so happened that the English rule was the one most favorable to them; but where the acceptor's estate pays a very small dividend and the drawer's estate, on the other hand, pays a large one, the creditors of the latter will usually be benefited by the carrying out of the results reached by the Scotch courts, for in such cases only a small share of the securities is required for the surety's indemnity, and the portion that is returned to the principal's estate will frequently more than offset the loss occasioned by reason of the increased proof.

With regard to the bill-holders, we may say that by the application of the English rule they will always be benefited at the expense of the general creditors of the acceptor's estate,<sup>1</sup> and sometimes, as will follow from what has already been said, at the expense also of the general creditors of the drawer's estate.

An apparent difficulty in applying the Scotch rule arises from the fact that as soon as the acceptor's estate has been indemnified for the first dividend paid to the bill-holders, the amount thus withdrawn from the security becomes an asset from which all creditors, the bill-holders included, are entitled to another dividend; if any part of the security still remains, the same process is repeated, *i. e.*, the bankrupt estate may reimburse itself to the amount of the bill-holders' share of the second and other dividends, until the whole of the security has been appropriated to its indemnity. Now it frequently happens that the dividends decrease much more rapidly than the security, in which event the above process would have to be carried on *ad infinitum*. As soon as it is discovered that this would be necessary, a simple formula<sup>2</sup> will

<sup>1</sup> We may except the case where the securities together with the dividends obtained from the drawer's estate are sufficient to pay the bill-holders in full.

<sup>2</sup> Suppose the acceptor's estate be able to pay 40% dividends, its liabilities being £10,000 and its assets £4,000; assume that the bills aggregate £6,000 and that the securities will yield £5,000. The first dividend of the bill-holders will be £2,400, the second 24% of £6,000 or £1,440, the third £864, the fourth £518 8 s. By this time the securities will be found to have been exhausted, and the acceptor's estate will suffer to the extent of £400. Now let us assume that the assets are £2,000 instead of £4,000, the liabilities, bills, and securities remaining the same as before. The first dividend will



it is submitted, determine the exact amount of all the dividends due each individual creditor. No such computation was rendered necessary in the case of *The Royal Bank v. The Commercial Bank*, 7 App. 366, because after the third dividend the security was exhausted.

It will be seen that in many cases the bill-holders are materially benefited by the fact that the acceptor holds funds for his indemnity, and it may be objected that to allow them to share in any way in the distribution of the latter is inconsistent with the very foundation on which the Scotch rule rests. In reality, however, what they receive is not taken from the securities as such, but from the assets of the debtor. The bill-holders do not occupy the position of preferred creditors, for they share the sums derived from the securities *pari passu* with the general creditors; nor do they profit at the expense of the acceptor's estate, since the latter has a right to reimbursement for every dividend paid. It is inevitable that the amount withdrawn from the securities should in its turn become an asset, and it is only just that the bill-holders, whose debt has not yet been extinguished, should be allowed to prove against it in competition with the other creditors.

Of the four views presented the last would seem to be the only one consistent with justice and the intention of the parties.

*William Williams.*

HARVARD LAW SCHOOL.

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be £1,200, the second £720, the third £432, etc. In this case it soon becomes evident that the securities will never be exhausted, though the above process be carried on *ad infinitum*. Now the aggregate of all the dividends may be readily determined as follows: The numbers 1,200, 720, 432, etc., will be found to constitute a geometrical progression, the ratio ( $e$ ) of the terms of which is  $\frac{720}{1200} = \frac{2}{3}$ , and their number infinity. Taking the formula  $s = \frac{a}{1-e}$  ( $a$  being the first term of the progression) we find the sum of the dividends in this case to be £3,000. The total amount of the securities to be divided among all the other creditors will be found to equal £1,200, or the first dividend. For if the bill-holders' dividends are  $a, b, c, d, \text{etc.}$ , to infinity, those of the general creditors will be  $a-b, b-c, c-d, \text{etc.}$ ; the last dividend being infinitely small, it will be found on addition that all the terms except  $a$  vanish. Having thus ascertained the total amount due the general creditors, it will only remain to distribute it in proportion to their respective claims.

# HARVARD LAW REVIEW.

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THE demand for the April number, Vol. I., No. 1, was so great as to exhaust the edition some time ago. To complete some special volumes, the editors of the REVIEW are anxious to obtain a few copies of that number. The Treasurer will make a liberal offer for one or more copies.

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DURING the month of January, 1888, seventy-five new members have been added to the Harvard Law School Association, representing 19 States and Territories. They are divided as follows: Massachusetts, 31; New York, 11; Ohio, 5; Illinois, 6; Connecticut, 3; New Hampshire, 3; Pennsylvania, 2; Wisconsin, 2; Delaware, Virginia, Arkansas, Vermont, Tennessee, Missouri, Louisiana, Kentucky, Rhode Island, and California, 1 each; and the District of Columbia, 2.

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AN idea of the amount of legal business in England is given by some statistics in the London "Times." The list for Hilary term showed a falling off under every head but that of chancery causes, as compared with the same term of the previous year. The number of appeals entered numbered 189, as against 249 the year before. The number of actions in the Queen's Bench Division, 660, as against 1,052; and the total number of causes and actions entered in the various Divisions amounted to 2,235 for Hilary, 1887, as compared with 2,286 for Hilary, 1886, being a decrease of 51. In the Queen's Bench Division it is noticeable that the popularity of trials before a judge without a jury goes on increasing. In practically all cases a plaintiff or defendant can claim to have a jury, but it is found that for many classes of cases a judge sitting alone is the best tribunal, and that both parties willingly forego their right to a jury. It is not long ago since the cases for trial with juries were in proportion of two to one. This change in the taste of suitors may fairly be considered as evidence of an increasing faith in the impartiality of the judicial bench.

A RECENT number of the "New York Times" says that "of one hundred and forty-four decisions which had been appealed to the Supreme Court of New York, fifty-one were either reversed or modified. Only ninety-three of the decisions appealed from were sustained. This proportion means that the court below, in the opinion of the upper court, errs in every third case which is carried up. It is clear that in the fifty-one cases mentioned, one or the other set of judges has mistaken the law. This is no small matter, both to those immediately concerned and to the general public. A rough estimate of the damages caused to the litigants and the State would amount to about \$15,000. To this must be added the losses caused by delay, both to the parties to the actions and to the jurors. Last, but not least, such a state of affairs is a direct blow at the dignity of the law, which, in order to accomplish its ends, should be kept above suspicion. There are only two plausible solutions of the uncertainty of the law: either the judges are careless and ignorant, or the legislature has so framed its statutes that their interpretation involves the courts in quibbles which, in many cases, are the direct means of defeating justice."

AN important decision has been recently made by the Interstate Commerce Commission<sup>1</sup> defining the extent to which the Interstate Commerce law applies to express companies. The conclusions reached are as follows:—

"In respect to some of the express companies there can be little, if any, doubt that they are fully subject to the provisions of the law. When a railroad company itself conducts the parcel traffic on its line by its ordinary transportation staff, or through an independent bureau organized for the purpose, or by means of a combination with other railroad companies in a joint arrangement for the transaction of this so-called express business, it will not be seriously questioned but that this branch of the traffic is subject to the Act to regulate commerce as fully as the ordinary freight traffic."

The case of independently organized express companies is, however, different. "A careful examination of the history and the language of the Act to regulate commerce has brought the Commission to the conclusion that the independent express companies are not included among the common carriers declared to be subject to its provisions as they now stand. The fact that a part of the express business of the country is, as above shown, within the Act, while another and a much larger part of the same business is not so described as to be embraced in the same statute, clearly points out the necessity of further legislative action. Either the entire express business should be left wholly on one side or it should all be included."

In the "First Annual Report of the Interstate Commerce Commission" for 1887, which we have received, through the courtesy of Judge Cooley, this distinction between independent and associated express companies, with the need for further legislation, is strongly affirmed, and the following additional comments are made:—

"What is said of the express business is applicable, also, to the business of furnishing extra accommodations to passengers in sleeping

<sup>1</sup> Report and Opinion of the Interstate Commerce Commission in the matter of the Express Companies. Decided Dec. 28, 1887.

and parlor cars. These accommodations are furnished, in some cases, by the railroad companies, and in others by outside corporations, which are not supposed to be embraced by the terms of the law. Outside companies are also to some extent engaged in the transportation of live-stock in cars owned by themselves, but transported over the railroads under special agreements with the railroad companies which supply the motive-power. As these last named companies furnish better accommodations for live stock, and transport them with less liability to injury, and with less shrinkage than is done in the ordinary stock-car, it is not improbable that they, like the companies which furnish special accommodations for passengers, may in time build up a large business in respect to which they will not be controlled by any existing legislation.

"It is well known, also, that the transportation of mineral oil is already, to a very large extent, in tank-cars owned by parties who are not carriers subject to regulation under the act to regulate commerce.

"If it is the will of Congress that all transportation of persons and property by rail should come under the same rules of general right and equity, some further designation of the agencies in transportation which shall be controlled by such rules would seem to be indispensable."

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In the Annual Report<sup>1</sup> for 1886-87, President Eliot says of the Law School: "The number of students being large, the expenditures for instruction, Library and Reading-room service, and repairs and improvements were increased, and yet a satisfactory surplus remained at the end of the year. The admission examination tends to keep uneducated persons out of the School, and admits to the regular course every year a few men without collegiate training, among whom are sometimes found very successful students; but the number of persons who have gained access to the degree through that examination has been only about nine a year on the average since the examination was instituted in 1877."

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PROFESSOR LANGDELL, in his report, gives an interesting account of the growth of the School in the last few years:—

"It is now just ten years since the three-years' course and the examination for admission went into operation. . . . By 1882-83, the three-years' course and the examination for admission, regarded as causes which diminished the size of the School, had spent their force, and henceforth an improvement is perceptible. Thus, in 1883-84, though the number of new entries was only eighty-six, an increase of two, the number of names on the catalogue was one hundred and forty-six, an increase of fifteen. In 1884-85 the number of new entries was one hundred and one, and the number of names on the catalogue was one hundred and fifty-three. The increase in the number of new entries was, however, abnormal; for the number of Harvard graduates who entered was fifty-six, being the largest number that has ever entered the School in any year, except 1879-80. In 1885-86 the number of new entries dropped to eighty-eight, a loss of thirteen, while the names on the catalogue numbered one hundred and fifty-four, a gain of one. There were therefore fourteen more old students in the School

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<sup>1</sup>Annual Report of the President and Treasurer of Harvard College, 1886-87.

than in the preceding year, — a fact which finds a sufficient explanation in the relatively large number of entries in the preceding year.

"In the year now under review (1886-87) the evidence of improvement was so decisive that the success of the three-years' course, and of the examination for admission, no longer remained a question; for the number of new entries rose to one hundred and thirteen, a gain of twenty-five, while the number of names on the catalogue rose to one hundred and eighty, a gain of twenty-six. Nor was this large increase in numbers due to an unusual proportion of Harvard graduates; for, of the one hundred and thirteen who entered during the year, only forty-six were Harvard graduates, — ten less than in 1884-85, and thirteen less than 1879-80. Moreover, the experience of the now current year makes it clear that the increase in numbers in 1886-87 was a genuine and regular growth; for the number of new entries in the current year already amounts to one hundred and twenty-four, a gain of eleven over the whole number of new entries in the preceding year, and a gain of twenty over the new entries up to the corresponding date in the preceding year. Nor is this number swollen by an unusual proportion of Harvard graduates, the number of Harvard graduates who have entered thus far being only fifty. The names on the catalogue for the current year number two hundred and fifteen, a gain of thirty-five over the preceding year, and a gain of twenty-six over the largest number on any preceding annual catalogue. . . . The present third-year class, which numbers thirty, numbered only fifty-five in its first year; and it happens, oddly enough, that it was the smallest first-year class that we have had since the three-years' course has been established. That a class which numbered only fifty-five when it entered should now, in its third year, number thirty, may well be pronounced remarkable. If the present first-year class, which numbers eighty-nine, holds out proportionally well, it will give us a third-year class of forty-eight.

"As to the causes of the prosperity which the School has enjoyed since the beginning of the year 1886-87, I have nothing new to suggest. Doubtless the increase in the amount of instruction in the second and third years, and the making of all the instruction in those years elective — measures which went into effect at the beginning of the year 1886-87, — have had something to do with it; but I think the Harvard Law School Association, especially through the celebration which it held a year ago, has had more to do with it."

THE February "Atlantic"<sup>1</sup> contains an interesting article by F. G. Cook, a graduate of the Harvard Law School in the class of '85, describing the progress of the recent movement in European legislation to make marriage no longer a mere religious rite, but a compulsory civil ceremony. We give an outline of its main points.

During the latter part of the middle ages marriage was regarded on the Continent as primarily a civil contract, which, although it was generally publicly solemnized by the priests, depended for its validity simply on the consent of the parties.

In the middle of the sixteenth century the Council of Trent affirmed marriage to be a religious sacrament. The Catholic countries on the Continent quickly promulgated this decree as law. Its influence

<sup>1</sup> "The Marriage Celebration in Europe." *The Atlantic Monthly*, vol. lxi, p. 245.

spread gradually to Protestant lands. The belief that marriage is primarily a religious rite became established; by the close of the eighteenth century "a religious ceremony was generally regarded as indispensable. Such ceremony was then ordained by law, and the minister celebrating it was made the delegate of the civil power."

The reaction began with the French Revolution, which marked the beginning of a new epoch in marriage legislation. In 1787 a decree of Louis XVI. gave Protestants the option of celebrating their marriages before the civil authorities by means of *le mariage civil facultatif*. In 1792 the establishment of *le mariage civil obligatoire* made the civil celebration of marriage compulsory. This principle, that marriage is primarily a civil institution, survived the French Revolution, and in 1804 it was incorporated in the Code Napoleon, which reenacted *le mariage civil obligatoire*. The civil ceremony is compulsory; the banns are published by the registrar, or municipal officer, who, after the presentation of birth-certificates and affidavits of consent of the necessary parties, declares the parties united in marriage in the town-hall in the presence of witnesses, and in the name of the law. The registration of the marriage is then drawn up and signed.

A subsequent religious ceremony is optional.

Since that time the principle has rapidly spread. Recent history shows a tendency in European law to approach a "common type" of marriage celebration,—that of the French compulsory civil marriage. Italy adopted it in 1866; a large majority of the States of the German Empire followed suit in 1875.

"Switzerland, like France, Germany, Italy, Belgium, and Holland, has carefully separated the civil from the religious celebration, prescribing the former as the only source of the legal status, and the civil registry as the only means of proof. Even where this French principle has not yet been adopted, steps preparatory to this have been taken, and its substantial acceptance by most Continental countries seems near. That marriage is at least an institution of society, and as such its celebration must be guarded and regulated by the State for the common good, has become a fundamental principle."

British law is different. Even prior to the Council of Trent the presence of an Episcopal clergyman was always necessary to the legal validity of a marriage, although it might be clandestine. In 1653 Cromwell's Barebones Parliament established compulsory civil marriage, but for a day only. In 1753 Lord Hardwicke's Act did away with the validity of clandestine marriages and made solemnization *in facie ecclesiæ* the only legal form. At length, in 1836, Lord John Russell's Act introduced optional civil marriage. "Those persons unwilling to be married by Episcopal rites are permitted to resort either to the customs of any other denomination, or to a ceremony wholly civil." The presence of the civil registrar is required except for Jews and Quakers. Ireland and Scotland present some modifications, but in general "in the British Isles, as well as on the Continent, the development of the law is toward the adoption of the civil celebration of marriage. In both, laxity, multiplicity, and confusion are gradually giving place to strictness, unity, and definiteness. In both, the functions of the State, as compared with those of the Church, have constantly increased in extent and in importance. But while in the former the prevailing type is *le mariage civil facultatif*, in the latter it is *le mariage civil obligatoire*."

AN address recently delivered before the Birmingham Law Students' Society by Sir Edward Clarke, English Solicitor-General,<sup>1</sup> has given renewed vitality to the movement in England to break down the distinction between barristers and solicitors, and make the legal profession into "one body, each member of which should be entitled to do any part of the work of the profession." The change is advocated as of benefit to the public, to barristers, and to solicitors.

The great hardship of the present system is the increased expense of litigation. The client engages a solicitor, and explains the case to him. In the County Court the solicitor can conduct the case alone, but, if the case comes up in a Superior Court, he must engage a barrister, for whose services the client pays. The barrister must then be instructed. All the facts are written out, the evidence copied, and a brief made out by the solicitor for the guidance of the barrister in pleading the case. All this is "written out in a big, round hand," and a correspondingly round sum charged the client therefor. "Thus," says Sir Edward Clarke, "at an enormous cost, the knowledge which the solicitor has is conveyed to another person, in order that he may put before the court the matters which probably the solicitor knows much better, and could explain just as well. In most cases the counsel is not the choice of the litigant, but is simply the counsel usually employed by the solicitor. Whether he performs his duty or neglects it, whether he does it well or ill, he is under no legal liability to the man by whom he is paid. The brief may not have told him all the facts; he may not have read it; he may be in another court when the case is being tried; but a client is absolutely in his hands, and cannot sustain any legal claim, even for the return of fees which have not been saved." . . . Thus, "by the artificial rules, the litigants are obliged to bear very heavy costs in order to have their case argued by counsel who very often know less of the matter than the solicitors who employ them, and do not argue it as well. . . . It is even worse in criminal cases. There the necessity of this duplication of parts is a very heavy burden on poor men who are accused."

The change is also urged as of benefit to both "the bar" and the so-called "inferior branch of the profession," by the wider range of activity made possible for young and struggling members of the legal profession in both classes, the greater opportunity for exercise of special qualifications, the admission of barristers to the larger share of work done, and profits received by the solicitors, and the admission of solicitors to the greater honors and emoluments of the bar; also, it is claimed that the standard of the learning and eloquence of the bar will be raised by the admission of solicitors, from whom "a larger knowledge of law is required . . . than is even now demanded for an admission to the bar;" also "stronger judges" would be obtained.

Sir Edward Clarke's chief argument from example is, that "in the United States the (single) system has been long established, and while the incomes of the leaders of the legal profession are not, I believe, inferior to those earned in this country, and the part taken by lawyers in public life is very considerable, all who have read the reports of legal proceedings in the United States recognize the ability of their advocates and the sound learning which is found on their judicial bench." He recognizes, in closing, grave objections to any sudden change in the existing system.

<sup>1</sup> The Irish Law Times and Solicitors' Journal, Jan. 25, 1888.

"The Law Times" is in favor of abolishing "middle-men in legal procedure," and declares that "no one who has had any experience of the working of the present system can shut his eyes to the fact that it entails unnecessary expense upon the suitor."

"The Law Journal" of Jan. 21 contains an *obiter dictum* which treats the address as an attack upon the bar, and declares, that "an institution like the bar seems likely to stand for some time to come the kind of rhetoric with which it is assailed, whether or not from the tongues of them of its own household."

"The Irish Law Times" is responsible for the following statement: "A bill will be introduced next session in connection with the fusion of the two branches of the legal profession. The bill was introduced last year, but too late to be read a second time. It is called the 'Sutor's Relief Bill,' and is backed by eight Conservative members, and provides that every suitor shall be heard either by barrister or solicitor before any tribunal, and that a solicitor may practise as a barrister, and *vice versa*."

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## CORRESPONDENCE.

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### THE JUSTICE OF PRIVATE PROPERTY IN LAND.

CAMBRIDGE, MASS.

IN the January number of the HARVARD LAW REVIEW Mr. Samuel B. Clarke reviews, from a judicial stand-point, Henry George's doctrine concerning land, reaching the conclusion that the ownership of land by private individuals is unjust. The object of this paper is to test the soundness of the reasoning through which this conclusion is reached.

Mr. George's primary propositions, as expressed by Mr. Clarke, are not to be disputed. Few will attempt to deny that "each human being, as against all others, and, so far as interference with him by them is concerned, is entitled to himself, to his life, to his liberty, to the fruits of his exertions, to the pursuit of happiness, subject only to the equal correlative rights of every other human being." Our laws recognize the right of an unborn babe to life, and seek to protect it from violence, even though it be the parents who threaten it. To protect life, liberty, and property, laws are framed, and that such laws may be made and enforced, government is necessary. As a government succeeds or fails in securing to those under its jurisdiction these fundamental rights, it is strong or weak; and, to a marked failure, the natural sequence is a revolution. When an institution is found to be repugnant to the natural rights of individuals, the government or the people, who are the source of government, may abolish that institution. If private property in land is adverse to natural rights the American people, who have for this reason already abolished property in slaves, may abolish property in land. Starting, then, from this common ground, let us follow George's chain of argument, as Mr. Clarke gives it, and see if it contains no unsound link.

Concisely given, the reasoning is as follows: It is agreed that all men have equal rights to life. A right to life means nothing if it does



not carry with it a right to the means whereby alone life can be sustained. Land is, literally, indispensable to life,—it is man's foothold, the only source of the means of nourishment and of comfort, the basis of all that man has power to form from matter. Since every man, then, has a right to life, he has a right to land; and since the rights of all men to life are equal, their rights to land are equal. A system, therefore, which fails to distribute the land equally among the inhabitants is wrong, and should be overthrown.

Where, in this argument, does the fallacy lie? Is it not in the word "*equal*"? What do we mean by saying that all men have *equal* rights to life? One child may be born strong and healthy, another weak and sickly; and in no way is their condition due to themselves. Do we mean that the weak child is, of right, entitled to a portion of the other's vitality? No, not that; we mean that each child has the right to keep whatever of life is *his*; and the strong child has no greater right to his larger share of life than the weak child has to his smaller portion. In the course of years their positions may be reversed; but, at all times, they have *equal rights* to their own. In the same way the *portion* of property to which each child is entitled at birth may be greater or smaller, but the *rights* of each to his own are equal; and in this sense it is true that all men have equal rights to land as well as to everything else that this world contains.

But George and his followers, while they use the word *equal* in the above sense when applied to rights to life, and even when applied to rights to commodities, give the word a different meaning when applied to rights to land: their proposition is, that since the *rights* of all men to live are *equal*, therefore all men are entitled to *equal portions* of the earth's surface. The Communists make the same mistake, but carry their argument to its logical conclusion, saying that since all men have equal rights to life and happiness, all men are entitled to equal shares of everything in the world necessary for, or conducive to, the attainment of these ends. George and the Communists are alike illogical, but the Communists are at least consistent. Let us examine the grounds for distinction that enable Mr. Clarke to hold with George, that while absolute property in land is unjust, absolute property in things other than land is justifiable.

That land is essential to life offers no ground for a discrimination, for land alone will not support life. Food, and, in this climate, shelter and clothing, are equally indispensable; yet George does not hold that these should be equally divided. "Land," says Mr. Clarke, "can be acquired by the exercise of one's natural faculties as readily and effectually as can any other physical thing. . . . In neither case is any *matter* created, that being beyond man's power to do. In both cases possession is taken and *form* is changed by brain-directed labor, and nothing else is done or happens." What, then, is the distinction? The reducing to possession, says Mr. Clarke, will not always give a good title, for a human being may be reduced to possession, and it is admitted that slavery is unjust. But the reducing of another's person or property to possession is clearly a violation of the other's rights. Possession will give a good title when no better title can be set up against it, and wherein does the possession of an unused block of stone give a better title as against the public than the possession of an unused acre of land? The appropriation of land interferes with the exertion of one's natural powers, says Mr. Clarke, which is not the case with the appro-

priation of other things. When the land in a given community is entirely taken up by others, a landless man cannot do anything *individually*. Let us see how it would be if he had land and nothing else. He could build no fire, for he would be without fuel. If Mr. Clarke says that fuel would be part of the land, he must say that private property in fuel is unjust. He could obtain no food, shelter, or clothing, — unless he were to dig a hole with his fingers and crawl into it. He might, indeed, exchange his land for other things, but that would not be acting *individually*. But, Mr. Clarke says, the appropriation of land interferes with the exertion of one's natural powers, while the appropriation of other things does not, because the supply of land is limited, while to the supply of other things there is no limit, or no known limit, if the land, which is the source of supply, be not monopolized. If Mr. Clarke had said "limited" instead of "monopolized" his sentence would have been true, though axiomatic. As it is now, Mr. Clarke asserts that an unlimited amount of products can be obtained from a limited source of supply. The State of Rhode Island, if the land were not monopolized, could feed the world! Mr. Clarke admits that it is beyond man's power to create matter. That being so, what can be more of a truism than the fact that if the supply of land be limited, the supply of the products of that land will be limited also? Surely in this there can be no distinction between land and things other than land. Nor can such a distinction be drawn. The truth is that all this world contains is, or once has been, land. The stones and bricks which compose our buildings we called land when they lay in the quarries and clay beds. The coal in the stove, and the iron of which the stove is made, were land when in the mines. The wood of the table, the linen that covers it, and the bread, fruit, and vegetables, as well as the dishes from which we eat, were all called land within a longer or shorter period of time. At what moment did they cease to be land and become the rightful subjects of property? When first separated from the soil? Henry George himself characterizes the lawyer's distinction of things movable and things immovable as "unphilosophical." "The real and natural distinction," says he,<sup>1</sup> "is between things which are the produce of labor, and things which are the gratuitous offerings of nature." But labor can create nothing, and land upon which labor has been expended in clearing and cultivation is as much the "produce of labor" as the stones that make up a church. In each case labor has been expended in changing the form of the "gratuitous offerings of nature" and nothing more has happened. Why, then, should not the land be as properly the subject of private property as the stones?

But to say that all men are not entitled to equal portions of the earth's surface is not to say that there are some men who are not entitled to land at all, and should therefore be cast into the sea, any more than to say that because all men are not entitled to equal shares of the earth's produce there are some men who should be left to starve. The right to property is subordinate to the right to life, and as, when a city is besieged, those who have more provisions must share with those who are not so well supplied; so when the supply of land becomes so scant that the right to life comes into conflict with the right to property, the inferior right must yield. The following illustration will, perhaps, better show my meaning: A man has ordinarily the right to keep

<sup>1</sup> Progress and Poverty, Book VII., c. 1.

trespassers from his premises. But suppose a land-owner's property is on a river-bank, and a drowning man, floating down the river, tries to make a landing. Here would be an instance of a smaller right yielding to a greater, and a land-owner who would, under these circumstances, push back the drowning man into the river, would become a murderer. And as every man has a right to life, so he has a right to the essentials of life, limited by the corresponding rights of others. With every child there is born a trust, and the child's parents or relatives are its natural trustees; but if the child is a foundling, the trust becomes binding on society, and society through its proper officers must assume the trust. Every child thus has a right *in personam* as well as a right *in rem*; but its trust estate may be anything from the checked apron and homely food of the orphan asylum, to the environment of luxury that surrounds the cradle of the infant millionaire. Such trusts determine when the child becomes of a proper age to earn its own living, but revive if the capacity for labor and the means of subsistence are removed. Our public institutions, whose object is to provide for those who cannot provide for themselves, are fast losing in the public mind the character of State charities, and assuming that of State trusts.

My object having been to defend only the *justice* of private property in land, I will not follow Mr. Clarke into that portion of his article which he devotes to its *expediency*. One thing seems certain: that if, as is expected by the advocates of George's system, all the land now used and much of the land now unused would be taken up and cultivated under that system, and if the government would protect its tenants, as it would be bound to do, in the enjoyment of their rights to the exclusive use of the land for which they would have to pay, a landless man would be in the same predicament in which he now finds himself, and might still go "from the Atlantic to far beyond the Mississippi river, and from the Pacific to the great mountains," without finding a place where he could legally dig a hole in the ground for shelter, or build a fire of sticks for warmth. Mr. Clarke's faith in the system must indeed be great if he can believe that any legislation that neither increases the area of the land, nor diminishes the number of the inhabitants, can place all the people of this country, "so far as abundance of natural opportunities is concerned, where their predecessors stood sixty or eighty years ago."

Land, as well as every other species of property, is subject to abuse; and the abuses to which the land is peculiarly liable, so clearly pointed out by Mr. Clarke, have already been noticed, and, in a measure, restricted by such legislation as the Statutes of Mortmain and Limitations, and the abolition of estates tail. The laws regulating the use of land are probably no nearer the standard of perfection than are the laws in any other department, and much improvement may probably yet be effected by means of prudent and conservative legislation. But is even the abuse of land worse than the abuse of other forms of property; and is the spectacle of one man owning 75,000 acres of rich land more deplorable than that of another man holding enough personal property to buy him out?

Paul C. Ransom.

## RECENT CASES.

**AGENCY — VICE-PRINCIPAL.**— A train dispatcher is not the fellow-servant of the employees engaged in moving the trains, but is as regards them a vice-principal so that the railroad company is liable for any injuries to such employees resulting from his negligence. *Lewis v. Leifert*, 11 Atl. Rep. 514 (Pa.). To the same effect is *East Tennessee, V. & G. R. Co. v. De Armond*, 37 Alb. L. J. 22 (Tenn.), collecting cases.

**ASSETS — WHAT IS A CLAIM AGAINST THE GOVERNMENT.**— By an act of Congress the amount of the fifteen and one-half million dollars of the Geneva award not paid out to those who had suffered actual loss was to be distributed to those who had paid increased premiums of insurance because of the risk from Confederate cruisers. *Held*, that on the bankruptcy of the defendant after the passage of the act this claim did not pass to the assignee in bankruptcy. It was a donation of the government, and not a claim because of a wrong done. *Taft v. Marsily*, 33 N. Y. Dail. Reg. 253 (N. Y. Sup. Ct.).

The same point was decided the same way in the Maryland Court of Appeals. *Ahrens v. Brooks*, 18 Md. L. J. 52. The question is also said to be pending before the United States Circuit Court at New Orleans.

**CARRIERS — MISDELIVERY OF FREIGHT.**— A was owner, shipper, and consignee of cattle, shipped upon defendant railroad, which gave receipts for the same. A indorsed the receipts to the plaintiff, a bank. The defendant delivered the cattle without an order from A to a third party, whom the defendant had in the receipt (or bill of lading) been directed to notify of the arrival of the cattle. *Held*, that the defendant was liable for the value of the stock, since the direction to notify a third party will not relieve a carrier from its duty to deliver to the consignee or his order. Moreover, it is the duty of a carrier to notify the consignee of the arrival of property if it is possible, and it seems that a direction in a bill of lading to notify certain persons is a plain indication, in the absence of further directions, that they are not the consignees. (See *Furman v. Ry. Co.*, 106 N. Y. 579.) *North Pa. R. Co. v. Commercial Nat. Bank*, 8 Sup. Ct. Rep. 266.

**CARRIERS — RIGHTS OF PASSENGERS.**— Defendant, a railroad company, took on board, not at a regular station, certain laborers engaged to take the place of strikers. These laborers were at that time protected from a mob by a strong police force. At the next regular station the train was attacked by a mob of strikers, and the plaintiff, a passenger in the same car with the laborers, was shot. *Held*, on a rehearing, Sheldon, C. J., and Magruder, J., dissenting, plaintiff can recover, as the defendant was not bound to take on passengers except at regular stations, and had reason to apprehend the danger to passengers thereby incurred. *Chicago & A. R. Co. v. Pillsbury*, 37 Alb. L. J. 27 (Ill.).

**CARRIERS — TICKET — LIMITING LIABILITY.**— A through ticket over several roads contained a printed stipulation limiting liability on baggage to \$100, and a further stipulation that the road selling the ticket assumed no liability beyond its own lines. This road carried a trunk to the end of its line; there its employees, assisted by employees of the union depot at the terminus, loaded it on a truck, and placed on top of it a box containing acid insecurely packed. The depot hands rolled the truck into the baggage-room, and, in unloading it, spilled acid over this trunk and destroyed the contents. *Held*, that the loss was caused by the negligence of the receiving road, and that the limitation of liability to \$100 was of no effect unless known to the purchaser of the ticket and assented to by him, because a passenger's ticket is ordinarily a check showing that fare has been paid, and he has no reason to suppose that he is entering into a contract. *Kansas City, etc., R. R. Co. v. Rudebaugh*, 15 Pac. Rep. 899 (Kan.).

The relation between the depot employees and the railroads is not stated, and it is not decided whether the liability of the first road would have continued, if the loss had occurred after the baggage was in the possession of a connecting line.

**CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES.**— A statute making it unlawful to practise medicine without a license, and providing that in order to obtain a license the applicant must exhibit proof either of having attended a reputable medical college, or of having practised medicine within the State con-

tinuously for ten years immediately prior to the passing of the act, is not unconstitutional as giving citizens of the State privileges or immunities not given to those of other States (U. S. Const., art. 4, sec. 2). *State v. Green*, 14 N. E. Rep. 352 (Ind.); s. c. 37 Alb. L. J. 43.

**CONTRACT—WHERE BROKEN.**—A press association doing business in London was sued in a contract by a patron in Dublin for negligently furnishing false news. The locality of the breach became material, and it was held that the contract was broken on the receipt of false news in Dublin, not on the delivery of it to the postal authorities in London. *Gray v. Press Association*, 21 Irish L. T. Rep. 73.

**EQUITY JURISDICTION—BILL OF PEACE.**—Plaintiff owned certain picnic grounds in the defendant village, which passed an ordinance of doubtful validity, punishing the keeping of public grounds for picnics or any purpose whereby disorderly people are congregated, as a nuisance. Seven prosecutions for violating the ordinance were instituted against the plaintiff. Under one he was convicted, and the other six were still pending. *Held*, equity will not enjoin the other prosecutions. *Poyer v. Village of Desplaines*, 37 Alb. L. J. 36 (Ill.). See *supra*, p. 255.

**EVIDENCE—BOOK ENTRIES.**—A material issue in a cause was whether the defendant's bank clerk had turned over certain collateral notes to the teller. The books showed that the clerk had so done. He testified that he had examined the entries, that they were in his handwriting, and that it was the custom to hand over the collaterals as the entries indicated. He also testified under objection that he did not speak from recollection, but that he was led to think, from seeing the entry in his handwriting, that he turned over the collaterals. This testimony was allowed, the court saying that "these entries, being made contemporaneously with the act done, were original evidence,—part of the *res gestæ*; and although it was necessary to call the party who made them, he being alive, his failure to recollect the transaction does not impair its probative force, he having shown that he kept his books correctly . . . it is really immaterial whether he was able to do more than verify his entries, and prove his invariable custom." *Mathias v. O'Neill*, 6 S. W. Rep. 253 (Mo.).

It is not strictly correct to say that book entries are admissible because they are part of the *res gestæ*. They are admissible for reasons peculiar to themselves, whether they are part of the *res gestæ* or not. The error is due largely to the statements in 1 Greenleaf on Evidence, §§ 115-120.

**FRAUDULENT CONVEYANCES.**—A chattel mortgage was executed by an insolvent, in ignorance of her financial situation, to an antecedent creditor. *Held*, that other creditors could not set the conveyance aside, either under a special statute of South Carolina or under the statute of Elizabeth. *Wietz v. Potter*, 32 Fed. Rep. 888.

**FRAUDULENT CONVEYANCE, BY A GRANTEE BACK TO HIS FRAUDULENT GRANTOR.**—A purchased land, which in order to keep from his creditors he caused to be conveyed directly to B. B becoming indebted to C, to protect the land, conveyed it back to A. A, hoping to obtain a homestead exemption in part of the land, conveyed the rest back to B in trust for A's wife (who had no notice of the fraud) in consideration of her giving up the right to dower in other lands. C filed a bill in equity to subject the land to his debt. *Held*, the conveyance was fraudulent as against C, for A had no right to a conveyance. The land is liable to C's debt, with the exception of the portion conveyed in trust for A's wife, she being a purchaser for value without notice. *Keel v. Larkin*, 3 So. Rep. 296 (Ala.).

**FRAUDULENT CONVEYANCES—MARRIAGE SETTLEMENT.**—Fraud cannot be presumed in an action to set aside a marriage settlement, but must be proved by clear and satisfactory evidence to have been concurred in by both parties; and this is so, irrespective of the amount of the husband's indebtedness, and even though his whole estate is included in the settlement. *Noble v. Davies*, 4 S. E. Rep. 206 (Va.).

**GENERAL AVERAGE—PASSENGERS' BAGGAGE.**—The libellant in an admiralty case seeks compensation for damage by water to his baggage, caused in putting out a fire in the compartment of an iron steam-ship where passengers' baggage was stored. *Held*, that the damage to the baggage was a necessary sacrifice, because of a great and common danger, and the libellant was therefore entitled to compensation, although, if some one else's property had alone been sacrificed, the baggage in

question could not have been called upon to contribute in the general average. This is a clear exception to the ordinary rule of reciprocity, viz., that compensation cannot be given where contribution could not have been required; but passengers' baggage is so excepted in English and American law, probably because of the annoyance which would otherwise be caused the passenger if his baggage could be detained until appraisal, with a view to an adjustment. This reason is, however, inapplicable when the passenger is himself seeking compensation, and the libellant here must indirectly contribute by a *pro rata* deduction from his actual damage according to the general average charge. *Heye v. North German Lloyd*, 33 Fed. Rep. 60.

INSURANCE BY MORTGAGEE—SUBROGATION.—A agreed to sell land and buildings to B, taking in return a certain sum in cash, or its equivalent, and a mortgage for the remainder of the purchase price. It was further stipulated that, upon execution of the conveyance, a policy of insurance previously taken by A upon the buildings should be assigned to B, who should reassign it to A as collateral security upon the mortgage. In the interim the policy should remain for their joint protection on the buildings. The vendee agreed to pay all subsequent assessments upon the policy. The buildings burned, the company paid the policy, and demanded to be subrogated to the rights of A as mortgagee. It was not clear whether the property was burned before the agreement was executed; but, assuming that it was, the court held that the company had no right to subrogation, since the agreement clearly showed the intention that the insurance should be applied to reduce *pro tanto* B's debt. (See *Kernochnan v. Ins. Co.*, 17 N. Y. 428; *Hay v. Ins. Co.*, 77 N. Y. 235; *Clinton v. Ins. Co.*, 45 N. Y. 454; *Sheldon on Subrogation*, § 235.) *Nelson v. Bound Brook Mut. F. Ins. Co.*, 11 Atl. Rep. 681 (N. J.), reversing 41 N. J. Eq. 485.

MALICIOUS PROSECUTION—ENTRY OF NOLLE PROS.—The entry of a *nolle pros.* is such an ending of the case as to entitle the defendant to sue for malicious prosecution, if the cause of action is otherwise complete. *Murphy v. Moore*, 11 Atl. Rep. 665 (Pa.). See *Bell v. Mathews*, 16 Pac. Rep. 97 (Kan.).

MARRIED WOMAN'S SEPARATE ESTATE—LIABILITY ON NOTE.—A married woman gave her note for money borrowed for the purpose of, and actually applied in making repairs upon her separate estate. The lender of the money did not lend it in the faith of its being expended in repairs. *Held*, she was not liable. *Sellers v. Heinbaugh*, 11 Atl. Rep. 550 (Pa.).

MORTGAGE—LEASE BY MORTGAGOR.—A mortgagor, who had agreed to convey to the mortgagee, for further security, "any property hereafter acquired," leased the whole mortgaged property to the defendant (the "Pan-Handle Co."). The mortgagee, because of default of the mortgagor, now brings suit, asking that the road be sold under a foreclosure, and that he may have the benefit of the lessee's covenants with the mortgagor. *Held*, that the lease was not after-acquired property to which the mortgagee was entitled under the mortgage; nor was it possible, on general principles, in the absence of agreement between mortgagee and lessee, to give the former the benefit of the lease. His only remedy "is to foreclose upon default of the mortgagor, or to take possession of the premises, and thereby place himself in position to obtain the future profits. Either step operates as an eviction of the tenant by title paramount, and leaves him at liberty to terminate the lease and quit." *Moran v. Pittsburgh, C., & St. L. Ry. Co.*, 32 Fed. Rep. 878.

NEGLIGENCE—INJURY TO STOCK FROM BARBED-WIRE FENCE.—The defendant constructed a barbed-wire fence between his pasture and the highway so negligently that the wires sagged down near the ground. The plaintiff's horse, straying along the highway, was entangled and killed trying to get into the pasture. Animals were by law allowed to run at large. *Held*, the defendant was liable. *Sisk v. Crump*, 14 N. E. Rep. 381 (Ind.).

NEGLIGENCE—UNLIKELY ACCIDENT.—A telegraph wire over defendant's railroad track having sagged a little, broke upon coming in contact with the head of an unusually tall brakeman standing upon an unusually high car. The wire upon breaking coiled around another brakeman, the plaintiff's intestate, dragging him from the car and killing him. Defendant had no notice of the sagging which made the wire dangerous. *Held*, the defendant was not liable. *Wabash, St. L., & P. Ry. Co. v. Locke*, 14 N. E. Rep. 391 (Ind.). The court cite with approval *Heaven v. Fender*, 11 Q. B. Div. 503.

**PARTNERSHIP—DEED TO A FIRM UNDER THE FIRM-NAME.** — Certain parties entered into an agreement whereby a real-estate business was to be carried on for the mutual benefit and profit of the parties thereto, under the name of the Grant's Pass Real Estate Association. In an action to quiet title it was held that the legal effect of the agreement was to form a partnership; and, whether or not a legal title passes by a conveyance to a partnership under the firm-name when this contains none of the names of the partners, the firm got an equitable interest good against a subsequent purchaser who took with notice of the deed to the firm.—*Kelley v. Bourne*, 16 Pac. Rep. 40 (Ore.).

**QUASI-CONTRACT — GOODS SOLD AND DELIVERED.** — The defendant ordered certain school-books from the dealer with whom he was accustomed to trade. The latter, having gone out of the business, induced the plaintiff to supply the books. At the time the books were shipped the plaintiff sent to the defendant an invoice and letter showing who supplied the goods, but the defendant gave no attention to them, supposing the goods were supplied as before. *Held*, notice being given before the goods were converted, the defendant is liable, and cannot excuse himself by his negligence. *Barnes v. Shoemaker*, 14 N. E. Rep. 367 (Ind.).

**STOCK—LIABILITY FOR UNPAID SUBSCRIPTION — BONA-FIDE PURCHASER** — The defendant bank took as collateral security without notice, a number of certificates of stock in the plaintiff corporation, the subscription price of which had been paid only in part. The defendant surrendered these certificates for new ones identical in form issued to itself, and is now sued for an instalment of the subscription price. *Held*, the defendant is not liable. The court went upon grounds of public policy. *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 6 S.W. Rep. 340 (Tenn.).

**TRANSFER OF STOCK—NATIONAL BANKS.** — Under the national banking act it is not the duty of an assignee of national bank shares to register his ownership in the transfer book of the bank in order to protect his assignor, who will otherwise be liable to contribute towards the liabilities of the bank. *Lessassier v. Kennedy*, 8 Sup. Ct. Rep. 244.

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## REVIEWS.

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**BRACTON'S NOTE-BOOK.** A Collection of Cases decided in the King's Courts during the Reign of Henry the Third, annotated by a Lawyer of that Time, seemingly by Henry of Bratton. Edited by F. W. Maitland. London: C. J. Clay & Sons. Three volumes. 8 vo. xxiii and 337, 720, 723 pages.

The history of this book is a striking illustration of the indifference of English lawyers to the history of their law. In 1842 a manuscript containing about 2,000 decisions in the first half (1218-1240) of the reign of Henry III. was acquired by the British Museum. There, for forty years, this treasure lay neglected, until at last, its nature and value were discovered by a foreigner. In 1884, Professor Vinogradoff, of Moscow, in a letter to the "Athenæum," gave his reasons for thinking it probable that this collection of cases was compiled for Bracton, and annotated by him. Even now, however, the publication of the "Note-Book" is not the work of the English Government, nor even of a learned society, but the labor of love of a single scholar, who has already made very valuable contributions to the history of English law in his edition of "Peas of the Crown," for the year 1221, and in two essays in the "Law Quarterly Review" upon "The Seisin of Chattels," and "The Mystery of Seisin."

The student of legal history cannot be too grateful for this publication. It diminishes materially the gap between 1200, when Palgrave's

"*Rotuli Curie Regis*" ends, and 1292, when the Year Books begin. The "*Abbreviatio Placitorum*," unsatisfactory at best, contains cases from only two of the years covered by this book.

The "Note Book" fills the last two volumes of the work. In the first volume the reader will find four separate indices of Actions, Things, Places, and Persons. These are preceded by an extremely interesting introduction, in which are developed, in a spirit singularly modest and fair-minded, the reasons for believing that Bracton was the owner and annotator of the "Note Book." Mr. Maitland's arguments will prove, we think, well-nigh, if not quite, convincing to his readers. The editor furthermore shows the strong probability that the "Note Book" was in the hands of Fitzherbert. Incidentally we get by far the best account of Bracton and his great "Treatise" that has yet been written. Every reader of this introduction will, we are sure, earnestly desire that its author may himself fulfil the hope, which he expresses, that Bracton's treatise may soon be "carefully and lovingly edited." No one is so well fitted as he to atone for the wrong done to the greatest of mediæval law-writers, and to remove the stigma inflicted upon English scholarship by that legal monstrosity known as the edition of Bracton by Sir Travers Twiss.

J. B. A.

SALE OF PERSONAL PROPERTY.—By J. P. Benjamin. From the latest American edition, with American notes, entirely rewritten by Edmund H. Bennett, LL.D. Boston: Houghton, Mifflin, & Co., the Riverside Press, 1888. 8vo. pp. 1010.

In taking up this latest edition of a treatise which has been a standard book for twenty years in England, one is immediately impressed with the improvement in the arrangement of the American notes. The last American edition of this work (in 1884), with which American lawyers are so familiar, was criticised because of its bulk and its inconvenient method of arrangement. In that edition, it will be remembered, the annotator presented the American law in a detached and fragmentary manner, sometimes interpolating a page or two into the original text, and sometimes confining his remarks to the usual place, the foot-notes. In the present edition, however, this perplexing system has been given up, and a more rational method followed. The American law has been entirely re-written and placed in one continuous note at the end of each chapter. These monographs form an able and scholarly summary of the American law of sales, to which one can turn at once without having to pick it out, with considerable labor, partly from the text and partly from the notes. In re-writing the notes Judge Bennett has wisely avoided multiplying citations on points of little controversy, and has refrained from devoting any space to extracts from judicial opinions. Although he has perhaps erred in adhering too strictly to this latter rule, he has succeeded in making a volume more compact and convenient than the last. There is one other point in regard to form which will meet with general approval, viz., the order of the decisions, which are sometimes given chronologically (p. 284), and sometimes alphabetically by States (p. 271). Either of these methods is a great improvement over the general usage of summing up the decisions in a chaotic mass. Would it not be possible, however, to combine the advantages of both by adding the dates to the alphabetical arrangement?

In regard to the substance of the book, as distinguished from form,



there prevails the same high standard of excellence which the name of Judge Bennett insures. The praise given to the former editions of this work can but be repeated, with the additional remark that the citations have been carefully brought down to date. Much new matter, too, has been added, and the chapters on Parties, Mutual Assent, Conditions, Warranty, and Stoppage in Transitu, show careful work. To support the general view in regard to acceptance by letter, many authorities are cited, though "in some of them other considerations enter into the decisions." In point of fact only a few of the cases so cited are directly in point, and the reader is left to find for himself those which really do turn upon "other considerations." We are glad to see that the learned Dean of the Boston University Law School inclines to agree in theory with the view expressed by Professor Langdell in 7 Am. Law Rev. 433. We must take exception, however, to the alliterative, but inaccurate, expression, "Dean of the Dane Law School," with which Professor Langdell is described. We are aware that in years gone by this was a somewhat common mistake, but, as early as 1859, we find the following statement in President Walker's annual report: "At the instance of the Law Faculty, the corporation have passed a declaratory vote in order to correct a prevalent error respecting the name by which this department of the University is known. The Hon. Nathan Dane, though not its founder, was one of its liberal and early benefactors, in consequence of which his name was given to one of the professorships and to the public building or hall occupied by the School; but it was never given or understood or expected to be given to the School itself. The true and legal name of the School is not, as many will have it, the Dane Law School, but the 'Law School of Harvard College.'" Whatever excuse may have once existed for calling it the Dane Law School must surely have ceased when the School was transferred to its present apartments in Austin Hall. To find the old epithet still clinging to the School in this present year of grace, seems a little out of date, especially from the Dean of a sister law school.

M. C. H.

METCALF ON CONTRACTS. Heard's Edition. Charles C. Soule. Boston, 1888. 8vo. pp. xlii, 433.

Mr. Justice Metcalf's book is too well known to call for any special comment. We must express a regret, however, in passing, that in his classification of contracts the learned author did not draw a sharper line between two distinct classes, both of which he includes under implied contracts. In the one class there is no promise expressed in so many words; but yet there is a meeting of minds, and from the surrounding circumstances and actions of the parties a distinct promise must be inferred. Of these contracts it may truly be said that they differ from express contracts merely in the mode of proof (p. 5, n. 1). The other class corresponds to the *obligationes quasi ex contractu* of the civil law (p. 6, n. c). Although it is commonly said that in this class of contracts the law will imply a promise, that is a pure fiction. At common law the ordinary remedy in the former class of cases was in special assumpsit; while in the latter class the only remedy was in general assumpsit. The following cases may be cited as examples of this latter class: *Jenkins v. Tucker*, 1 H. Bl. 90; *Bradshaw v. Beard*, 12 C. B. N.S. 344; *Chase v. Corcoran*, 106 Mass. 286.

The author in his text (p. 187 *et seq.*), as well as the editor in his

notes, has given, we think, too broad a definition of consideration. It is said to be an act from which the promisor derives a benefit, or one which operates as a detriment to the promisee. The latter seems to be the true test. The promisor may derive a benefit from an act of the promisee, which cannot be the consideration for a promise. But a detriment suffered by the promisee at the request of the promisor is always a good consideration.

The editor has preserved the original text, and has added a few sections in brackets. Valuable additions in the way of notes, consisting for the most part of recent Massachusetts and English citations, have been made, notably in the chapter on Partners. This edition also has an appendix containing a memoir of the author. B. G. D.

THE FIRST ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION, 1887, 8vo, pp. 240.

Since the establishment of this Commission, Judge Cooley and his associates have been steadily engaged in expounding the Interstate Commerce Bill, and it is now recognized, that although many difficulties still stand in the path they must travel, they have achieved great success both in doing away with many abuses which have disgraced American railway management and in imposing certain wise and necessary regulations directed both to control and to protect our railroad corporations. Broadly underlying all the decisions of the committee can be traced the great truth spoken by Judge Cooley at the dinner last June of the Harvard Law School Association: "The strength of the law lies in its commonplace character; and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of man." And in giving a construction to the most difficult and perplexing section of the Act—the long and short haul clause—the recognition that this truth was vital, if the law laid down by the Commission was to be efficient for good, led to the adoption of a principle in harmony with the actual facts of railroad operation, that rates must be based on what the traffic will bear; while the principle on which the courts of law had hitherto travelled, that rates must and could be based on cost of service, was abandoned, because it disregarded certain vital elements of railway management, and thus afforded no sound or possible basis for beneficial railway regulation.

Thus to lawyers, beyond the mere establishment of a great body of new law, the work of the Commission is of interest as an illustration that true principle must triumph in the end, and that the only true principle or theory is that which gives the final reason, though oftentimes not the perceived cause or motive, for men acting in the way they do.

A discussion of the subject-matter of the report would seem out of place in view of the able article by Prof. Arthur T. Hadley on the Interstate Commerce Bill, in the January number of the "Quarterly Journal of Economics," which treats very fully and carefully the workings of the act, both in its legal and practical aspect. E. N.

THE NATIONAL LAW REVIEW. Vol. I., No. 1. N. M. Taylor, Editor. Philadelphia. pp. 48.

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## A BRIEF SURVEY OF EQUITY JURISDICTION.<sup>1</sup>

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### III.

IT has been stated on a previous page<sup>2</sup> that, while equity assumes jurisdiction over torts chiefly for the purpose of supplying a remedy by way of prevention, it assumes jurisdiction over contracts chiefly for the purpose of supplying a remedy by way of specific reparation. This latter remedy is, indeed, constantly termed specific performance; but that is in strictness a misnomer. The remedy by way of prevention is the true specific performance; for the object of that remedy is to prevent a violation by the defendant of the plaintiff's right, and, whenever the remedy is successful, that object is completely accomplished. But to prevent a defendant from violating a plaintiff's right is to compel him specifically (*i.e.*, strictly and literally) to perform his duty to the plaintiff. There is, indeed, this difference between the terms "prevention" and "specific performance," namely, that the former is negative, while the latter is affirmative; and hence when equity enforces performance of a negative duty, the remedy is properly called prevention, while, if equity did in truth enforce performance of affirmative duties, the remedy would properly be called specific performance. But, in truth, equity does not attempt to enforce performance of affirmative duties, and therefore it does not attempt to enforce performance of contracts, *i. e.*, affirmative contracts. What is com-

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<sup>1</sup> Continued from page 131. The case of *Phillips v. Homfray*, 24 Ch. D. 439, ought to have been cited at page 131, note 1. It was omitted through inadvertence.

<sup>2</sup> *Supra*, page 120.

monly called the specific performance of contracts is the doing of what was agreed to be done, but not at the time when it was agreed to be done; *i.e.*, not till after the time when it was agreed to be done is past, and hence not till the contract is broken. In order to obtain strict performance of a contract, a bill would of course have to be filed before the time for performing the contract arrived; but in fact a bill will not lie (any more than an action at law will lie) upon an affirmative contract until the contract is broken.

What, then, is the reason of this sharp distinction between negative and affirmative duties, namely, that a bill will lie to prevent a breach of the former, while a bill will lie only to enforce a specific reparation of a breach of the latter? First, it is a fundamental principle of procedure that, before any application can be made to a court for relief in respect to a right, the right must be actually violated. This principle is so universal, in all systems of law known to Western civilization, that writers upon jurisprudence assume<sup>1</sup> (if they do not state) that no substantive right, whether absolute or relative, will ever support an action; that every action is founded upon a right resulting from the violation of a substantive right, the law imposing upon every person who violates a substantive right an obligation to indemnify the person injured, and of course vesting in the latter a correlative right to be indemnified for the injury; and hence that the violation of some substantive right is always a *sine qua non* of the maintenance of an action. It follows, therefore, that all remedies by way of preventing the violation of rights are exceptions to an acknowledged rule; and exceptions to an acknowledged rule must never be so extended as to destroy the rule itself.

Secondly, it has already been seen<sup>2</sup> that the violation of negative duties could not be effectively prevented, unless the court could provisionally restrain their violation during the pendency of suits to prevent their violation; *i. e.*, unless the court could provisionally restrain defendants from doing certain acts before the court knows or can know that the acts are such as ought to be restrained. The same thing is equally true of the violation of affirmative duties (though for somewhat different reasons); for an affirmative duty is violated the moment a certain length of time

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<sup>1</sup> See Holland, *Jurisprudence* (3d ed.), ch. 13.

<sup>2</sup> *Supra*, pages 120-121.

elapses, or a certain event happens without its being performed; and, in the great majority of cases, the time for performance would arrive before a decree for performance could possibly be obtained. Could, then, a court of equity restrain the violation of an affirmative duty provisionally and before any trial of the right, as it does in case of a negative duty? Clearly not; for the only way of restraining the violation of an affirmative duty is by compelling performance of it; and hence any restraint of the violation of an affirmative duty is of necessity (not provisional, but) final. To impose such a restraint, therefore (*i. e.*, to compel performance of the duty), before the hearing of the cause, would be to decide the cause, and decide it finally, without any trial, and thus to render a trial entirely futile; for, though a trial should be had, and should result in establishing that no performance was due to the plaintiff, yet the court could not undo what it had done.

It will be seen, therefore, that there is a very broad distinction, in respect to the power of a court of equity to interfere before trial, between affirmative and negative duties, — between restraining a defendant from acting, and compelling him to act. And yet this distinction has sometimes been lost sight of. For example, where a court of equity is called upon to compel a defendant to undo a tort which he has already committed, *i. e.*, to make specific reparation for a tort, what is required of the defendant is the performance of an affirmative duty; and therefore the court cannot properly interfere until the cause is heard, and a decree made in the plaintiff's favor. And yet courts (misled perhaps by the fact that the subject of the suit was a tort) have sometimes compelled defendants to act in such cases by order, made upon motion and before the hearing of the cause, — not indeed directly, but indirectly, *i. e.*, not by commanding them to undo the tort, but by commanding them not to omit undoing it, as if the distinction between affirmative and negative were merely a distinction of words.<sup>1</sup> It is idle to attempt to support such orders by calling them mandatory injunctions, for the reason why an injunction can be granted before the hearing is that it is prohibitory, — not mandatory.

There is another reason why it is not practicable for a court of equity to enforce strict performance of an affirmative contract, namely, that there is but one day when such performance is possible, *i. e.*, the day when performance becomes due; and while it is

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<sup>1</sup> See cases cited *supra*, page 129, note 2.

frequently possible for equity to compel a defendant to do an act against his will, it is quite out of its power to compel him to do it on a particular day previously appointed.

Finally, it has already been seen<sup>1</sup> that equity will not entertain a bill to prevent a breach even of a negative duty, unless it appear that a breach is actually contemplated by the defendant; and, as a breach of an affirmative duty consists merely of inaction, it is comparatively seldom that an intention to commit a breach of an affirmative duty can be proved.

Upon the whole, therefore, equity never attempts to compel strict performance of affirmative contracts, but contents itself with compelling reparation for breaches of them. This reparation, as we have seen, equity makes specific, so far as possible; namely, by compelling the thing to be done which was agreed to be done, though the time when it was agreed to be done is past. Such a reparation will, however, presumptively be incomplete, for the plaintiff will have been kept out of his right from the time when performance was due to the time when it is actually obtained; and he will therefore be entitled to compensation for that injury. The measure of such compensation, in case of unilateral contracts, will generally be the actual value of the use and enjoyment of the thing due to the plaintiff during the time that he has been deprived of its use and enjoyment. In case of most bilateral contracts, as the plaintiff is not required to perform until the defendant performs, the measure of the plaintiff's compensation will generally be only the difference, if any, between the benefit that he has derived from the delay in performing his own side of the contract, and the injury that he has suffered from the defendant's delay in performing his side of the contract. In an action at law this compensation would be given by a jury in the shape of damages; and, as a judge in equity cannot perform the function of a jury in assessing damages, cases may arise in which the plaintiff's compensation for delay in performing the contract will have to be assessed by a jury.<sup>2</sup> In most cases, however, equity will be able to ascertain the compensation to which the plaintiff is

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<sup>1</sup> *Supra*, page 127.

<sup>2</sup> For example, when it is held that the plaintiff is entitled to special damages for the defendant's delay in performing the contract. For an instance of this, see *Cory v. Thames Iron Works and Ship-building Co.*, 11 W. R. 589, L. R. 3 Q. B. 181. In *Jaques v. Millar*, 6 Ch. D. 153, special damages, to which the plaintiff was held to be entitled, were assessed by the judge in equity; but this was done under the authority of a statute.

entitled by its own method, namely, by computation and account. For example, in the common case of a contract for the purchase and sale of land, the proper compensation for delay in paying the purchase-money is legal interest on the purchase-money, while the proper compensation for delay in conveying the land is the rents and profits of the land. Accordingly, in a suit by a vendee, if the rents and profits of the land exceed the interest on the purchase-money, the vendee will recover the difference. So, in a suit by the vendor, if the interest on the purchase-money exceed the rents and profits of the land, the vendor will recover the difference. This mode of ascertaining the compensation to which a plaintiff is entitled seems not to require any special justification, as it seems that a jury ought, in most cases, to act upon the same principles in assessing a plaintiff's compensation by way of damages. In fact, however, equity acts upon a very clear principle of its own, namely, that what ought to have been done shall be considered as having been done. For example, in case of a contract for the purchase and sale of land, if the purchase be completed under the decree of a court of equity, the rights of the parties will be regarded as the same in equity that they would have been at law, if the purchase had been completed pursuant to the contract; or, in other words, the completion of the purchase will be held in equity to relate back to the time when by the contract it ought to have been completed. But if the purchase had been completed at the time stipulated for in the contract, the vendee would have had the use and enjoyment of the land, and the vendor would have had the use and enjoyment of the purchase-money from that time; and hence it follows that the vendor, having had the use and enjoyment of the land when the vendee ought to have had it, must account to the vendee, and the vendee, having had the use and enjoyment of the purchase-money when the vendor ought to have had it, must account to the vendor.

It has been assumed hitherto that the plaintiff alone can recover a compensation for delay in performing the contract; and yet a mutual accounting, on the principles before stated, may result in a balance in favor of the defendant. Shall the defendant in that event recover the balance in his favor? It may be objected, first, that a decree cannot be rendered in favor of a defendant as such, and that, if a defendant would have a decree in his favor, he must file a cross-bill; secondly, that, even if a defendant should file a

cross-bill, he never could be entitled to a decree in his favor, as he stands before the court in the light simply of a wrong-doer, and therefore is not in a condition to set up any claim in his own favor. Neither of these objections, however, is valid. First, in a suit for the specific performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, there is, as will be seen presently, no difference between the plaintiff and the defendant *as such*, *i. e.*, they are both plaintiffs and both defendants, and any decree which is made is in favor of both and against both. Secondly, in such a suit it does not follow, as will be seen hereafter, that the defendant — still less that the defendant alone — has broken the contract. The contract may have been broken by both parties, or it may have been broken by the plaintiff alone. Whenever, therefore, any distinction is to be made between the parties to such a suit, it must be, not between the plaintiff and defendant as such, but between the one who has broken the contract and the one who has not. In most cases, however, no distinction should be made between the parties, so far as regards the mutual accounting, but the vendee should be charged with legal interest on the purchase-money, and the vendor with the rents and profits of the land, as before stated. If, however, a vendee have his money ready at the day fixed for the performance of the contract, and the performance be delayed through the default of the vendor, and the vendee keep himself in constant readiness to perform by letting his money lie idle, he will not be required to pay interest. In such a case, however, the vendee ought to notify the vendor that the money is lying idle; and it would be prudent for him to deposit the money in a bank to a separate account, and to notify the vendor that he had done so. So if a vendor be ready at the day to perform on his part, and the performance be delayed through the default of the vendee, the vendor will seldom, if ever, be liable beyond the rents and profits actually received by him; but if performance be delayed through the default of the vendor, he will be liable for such rents and profits as he might with reasonable diligence have received; and if the property have been injured, or have deteriorated in value, through his fault, he will be required to compensate the vendee in damages for the injury or deterioration in value; and these damages will frequently have to be assessed by a jury.<sup>1</sup>

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<sup>1</sup> See *Cory v. Thames Iron Works and Ship-building Co.*, *supra*.



When equity enforces specific reparation for the breach of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, it encounters a difficulty of procedure which is unknown to courts of common law; for, as by the contract neither party is bound to trust the other, but each may insist that both shall perform at the same moment of time, and as equity enforces performance of the contract in every point except that of time, it follows that equity cannot enforce performance by the defendant unless the plaintiff also performs concurrently. If this were all, there would be no serious difficulty, so far as regards procedure; for then it would only be necessary for the court by its decree to appoint a time and place for performance by the defendant, and to direct him to perform, provided the plaintiff also performed. That, however, would be unjust to the defendant; for it would impose upon him the burden of making all the necessary preparations, and holding himself in readiness for performing his part of the contract, and yet leave him in a state of complete uncertainty, up to the last moment, as to whether the plaintiff would perform his part. Accordingly, equity says the plaintiff shall not be permitted to blow hot and cold, but that, having elected to have the terms of the contract carried out, notwithstanding the time stipulated for is past, he shall be bound by his election, and shall therefore be compelled to perform on his part. But how can performance be enforced against a plaintiff, against whom no complaint is made, nor any relief asked, and who would not be before the court at all, had he not come before it voluntarily, seeking relief against the defendant? The difficulty might perhaps be met by the defendant's filing a cross-bill, praying that, if he be compelled to perform, the plaintiff also be compelled to perform concurrently with the defendant. But clearly the defendant is not bound to file a cross-bill; he does not wish to have the contract performed, and he is not bound to assist the plaintiff in his endeavors to compel the performance of it; nor will the defendant's refusal to file a cross-bill justify the court in making a decree against the defendant which, but for such refusal, would be unjust. However, courts of equity have succeeded in surmounting this difficulty without any stretching of their powers, and without doing any injustice to either party; for they make it a condition of giving relief to the plaintiff that he shall submit to have a decree made against himself also, and indeed they treat a plaintiff as so

submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently; and, if either of them refuses or neglects so to perform, he will be punished for contempt on the application of the other.

Having thus seen how equity exercises jurisdiction over affirmative contracts (and what is true in this respect of affirmative contracts is equally true of all affirmative obligations, whether created by contract or not), we are prepared to inquire over what affirmative contracts or obligations equity will assume jurisdiction. And here it must be borne in mind that we are now dealing only with the legal rights created by contracts and other obligations. When contracts or other obligations are the means of creating equitable rights, such rights can, of course, be enforced by equity alone; and hence equity assumes jurisdiction over such rights as of course. In what cases, then, will equity assume jurisdiction over the legal rights created by affirmative contracts and other affirmative obligations? In all cases in which these two questions can be answered in the affirmative, namely: First, will a compensation in money be an inadequate remedy for a breach of the contract or other obligation? Secondly, can equity enforce a specific reparation of the breach? <sup>a</sup> It will be convenient to consider the second of these questions first; for the first question will arise only in those cases in which the second can be answered in the affirmative. The second question can be easily answered with sufficient accuracy for most purposes. If a contract consists in giving (*dando*), equity can enforce a specific reparation for a breach of it; if it consists in doing (*faciendo*), it cannot.<sup>1</sup> Accordingly, equity will assume jurisdiction, *e. g.*, over all contracts for buying

<sup>1</sup> Of course it is not meant that it is impossible for equity to enforce any contract which consists in doing; but only that the enforcement of such contracts in equity is likely to involve so much difficulty that equity will not attempt to enforce them. To this rule there are, however, exceptions. For example, in England if a railway company purchase land over which to construct its line, and agree, as a part of the consideration for the sale, to construct certain works on the land purchased, either with a view to rendering the railway less injurious to the vendor, or with a view to affording facilities to the vendor for using the railway, equity will compel the railway company to construct the works. *Lytton v. The Great Northern Railway Co.*, 2 Kay & J. 394; *Storer v. The Great Western Railway Co.*, 2 Y. & Coll. C. C. 48. This exception is supported by very strong reasons: first, the railway company is paid in advance for constructing the works; secondly, the vendor

and selling and for exchanging one thing for another, if a compensation in money be an inadequate remedy for a breach of them; but it will not assume jurisdiction, *e. g.*, over contracts for services or building contracts. In what cases, then, will equity deem a compensation in money an inadequate remedy for the breach of a contract which consists in giving? Here again a distinction must be taken between those contracts which consist in giving something which is specified and identified by the contract, and those which consist in giving something of the kind, quality, or description specified in the contract. In cases belonging to the second class, it seems that a compensation in money will always be an adequate remedy for a breach of the contract; for the thing contracted for cannot be worth more to any one than the sum of money for which it can be purchased in the market, and that sum will be the measure of the compensation which a jury will give for a breach of the contract. It cannot, therefore, be very material to the person who has contracted for the thing whether he receive the thing itself or a sum of money with which he can purchase the thing.<sup>1</sup> In cases belonging to the first class, on the other hand, there is but one thing in existence which will satisfy the contract. If, therefore, that one thing has a value in the eyes of the person who contracted for it, which cannot be measured by money, or a greater money value than it can properly have in the eyes of a jury, it is clear that a compensation in money will not be an adequate substitute

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cannot construct the works himself; thirdly, an English railway company is more amenable to the authority of a court of equity than is an ordinary private individual.

Another exception (founded however upon very different reasons) is where an informal agreement is made to enter into a formal contract. Although the informal agreement, in such a case, consists in doing, yet it is as easily enforced as any contract which consists in giving; for all that the defendant is required to do is to sign (or sign and seal) and deliver the formal contract, when the latter has been drawn up (under the direction of a Master, if necessary) in conformity with the informal agreement. Whenever, therefore, damages will not be an adequate remedy for a breach of the informal agreement, equity will compel an execution of the formal contract. Accordingly, an informal agreement to insure (*i. e.*, to issue a policy of insurance) will be enforced in equity; for, if the insured should bring an action at law, he would recover only nominal damages. It is possible, indeed, that the insured might recover for a loss in an action at law without a policy; but, even if he could, the loss would constitute a separate and distinct cause of action, and would not affect the right of the insured to have a policy.

<sup>1</sup> The English courts have, however, made one extraordinary exception to the rule that such contracts will not be enforced in equity, namely, in the case of contracts for the purchase and sale of shares in companies. This exception was first established by the case of *Duncuft v. Albrecht*, 12 Sim. 189. That case has not generally been followed, however, in this country.

for the thing itself. But here an important question arises, namely, whether the jurisdiction of equity will depend upon the nature of the thing contracted for, or upon the views and intentions of the person who contracts for it in the particular case. If it depends upon the former, it is a question of law, and it should be the subject of settled rules; if it depends upon the latter, it is a question of fact, and hence the fact must be tried as often as the question arises. Unfortunately, the question cannot be answered unqualifiedly either way; but, for the most part, the jurisdiction of equity undoubtedly depends upon the nature of the thing contracted for. To make it depend upon the actual views and intentions of one of the contracting parties would be subject to two very serious objections: first, that the decision of the question of jurisdiction would involve a ruinous expense both to the parties and to the public; secondly, it would involve an inquiry which a court of justice can seldom enter upon with much chance of getting at the truth, and which, therefore, it should never enter upon except from necessity. Upon the whole, it may be said that the jurisdiction will depend exclusively upon the nature of the thing contracted for, wherever the court can see its way to laying down an absolute rule; but where it cannot, it would be too much to say that all evidence as to the views and intentions with which the thing was contracted for in the particular case will be excluded.

In what cases, then, will equity assume jurisdiction over a contract which consists in giving a specified thing on account of the nature of the thing? It will do so, first, whenever the thing is land, or any interest in land, or any incorporeal thing material to the enjoyment of land; secondly, whenever the thing is a vessel, or any interest in a vessel;<sup>1</sup> thirdly, whenever the thing is a chattel for which no substitute can be obtained, or for which a substitute can be obtained only with great difficulty. It must be confessed that this last rule is somewhat vague; but we must choose between a vague rule and no rule at all. Unfortunately, also, there are but few precedents by which the application of this rule can be illustrated. One reason of this will doubtless be found in the peculiar rule of our law respecting the sale of chattels (other than vessels); namely, that the moment that a contract is made for the sale of a chattel, the title to the chattel passes from the seller

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<sup>1</sup> *Hart v. Herwig*, L. R. 8 Ch. 860. The statement in the text assumes that the jurisdiction of equity is not interfered with by registry acts. See *infra*, page 377, note 2.

to the purchaser. In consequence of this rule, the right of a purchaser of a specific chattel is commonly a right of property from the beginning,—not a right resting upon contract. There is, however, a rule of equity jurisdiction, which is so strictly analogous to the one under consideration, that the precedents which illustrate the application of the former will illustrate the application of the latter also, namely, the rule that a bill in equity will lie to recover the possession of a chattel wherever a compensation in money would be an inadequate remedy. That rule will be considered hereafter.

It is obvious that contracts which consist in giving specified things are almost invariably bilateral; and yet it is commonly only one of the parties to the contract who is to give a specified thing; and even if a specified thing is to be given by each party, yet the thing to be given by one may be of such a nature as to give a court of equity jurisdiction over the contract, while the thing to be given by the other is not. How, then, is the question of equity jurisdiction to be dealt with in case of a bilateral contract, one side of which is of such a nature as to give a court of equity jurisdiction over the contract, but the other is not? It must first be ascertained whether the two sides of the contract are or are not mutually dependent upon each other. If they are not, they are to be regarded, for the purposes of the question now under consideration, as two separate unilateral contracts; for in such a case the two sides of the contract can never be the subject of any one suit (unless, indeed, a suit and a cross-suit be regarded as one suit), and therefore the question whether equity has jurisdiction over one side of the contract is always independent of the question whether it has jurisdiction over the other side of the contract. It is upon this ground that the decision rests in the important case of *Jones v. Newhall*;<sup>1</sup> for, though performance by the plaintiff was there dependent upon performance by the defendant, yet the converse was not true; on the contrary, performance by the defendant was a condition precedent to performance by the plaintiff. Consequently, though the defendant, on paying or tendering the purchase-money, could have maintained a bill in equity for a conveyance of the land, yet the plaintiff could not maintain a bill to recover the purchase-money, his remedy at law being perfectly adequate; nor could he, it seems, even though performance

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<sup>1</sup> 115 Mass. 244.

by him had been a condition precedent to performance by the defendant; for though he could not in that case have recovered the purchase-money at law until he had conveyed the land, even though he were prevented from conveying the land by the defendant's refusing to accept it, and could only recover special damages for the breach of the contract by the defendant by which he was prevented from conveying the land, yet it seems that special damages are always an adequate remedy for a breach of contract by a vendee which prevents performance by the vendor.

When, however, the two sides of a bilateral contract are mutually dependent upon each other, as they almost invariably are in contracts for the sale of property, equity cannot, as we have seen, enforce performance of one side of the contract, unless it enforces performance of the other side also. Therefore, if one side of such a contract be of such a nature that equity cannot enforce it, then it cannot enforce the other side either. If, therefore, A and B agree that A shall serve B for one year, and that B shall convey to A a certain piece of land, and B break the contract by refusing to permit A to serve him, yet A can have no relief in equity, as equity cannot compel performance by A. It is true that, in this case, the two sides of the contract happen not to be *mutually* dependent, because performance by A is a condition precedent to performance by B; and if A could perform his side of the contract without the coöperation of B (*i. e.*, if B could not prevent performance by A), equity would enforce performance by B at the suit of A (A having first performed on his part), though it could not compel performance by A at the suit of B. But, as B can prevent performance by A (*i. e.*, as A cannot perform without B's coöperation), the case is the same in respect to equity jurisdiction, as if the two sides of the contract were mutually dependent upon each other. On the other hand, if both sides of the contract be of such a nature that equity *can* enforce them, and one side be of such a nature that equity *ought* to enforce it, then equity will enforce both sides, though the other side consist merely, *e. g.*, in the payment of money; and this equity will do, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well. Accordingly, it has never been doubted that a vendor of land has as much right to enforce performance of the contract in equity as the vendee. This right of the vendor cannot, indeed, be demon-

strated. Equity might have refused to assume jurisdiction, except at the suit of the vendee, without committing any absurdity, and perhaps without doing any clear injustice to the vendor. Courts of equity have preferred, however, in this as in other cases, to adhere to their favorite maxim that equality is equity.

Having thus seen in what cases equity will assume jurisdiction over contracts, it remains to inquire under what circumstances equity will give relief to a plaintiff who sues upon a contract. As such a plaintiff founds his suit upon a legal right, the circumstances under which he is entitled to recover are generally the same in equity as at law, but not always. It is always in the discretion of a judge in equity whether he will aid a legal right; and hence he may refuse relief to a plaintiff who sues upon a contract, though the plaintiff's right to recover at law be conceded, and though equity confessedly have jurisdiction of the case. It follows, therefore, that more may be required of a plaintiff who sues in equity upon a contract than would be required of him at law; and more is required in fact. First, it is not sufficient in equity that a contract be under seal, nor even that it be supported by a sufficient common-law consideration; it must also be supported by a consideration which equity regards as sufficient. Generally a consideration which is sufficient at law will be sufficient in equity also, but not always. For example, one dollar is a sufficient consideration at law to support a promise to convey the largest estate; but equity would not enforce performance of such a promise, even though it were under seal. So a consideration which is sufficient in equity will generally be sufficient at law also, but not always. For example, a desire to reconcile a father to the marriage of his son will be a sufficient consideration in equity for a promise to convey an estate to the son, though it is no consideration at law.<sup>1</sup> If, therefore, such a promise be under seal, equity will enforce it; but if it be not under seal, equity will not enforce it, because it is not valid at law. In short, as by the civil law an agreement must have a "cause" (*causa*) in order to create an obligation,<sup>2</sup> so in equity it must have a "cause" in order to be enforced in equity; and this "cause" is not precisely the same thing as our "consideration."

Secondly, equity will not enforce a contract if its enforcement

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<sup>1</sup> *Wiseman v. Roper*, 1 Ch. Rep. 84.

<sup>2</sup> See Pothier, *Traité des Obligations*, §§ 42-46.

will not be conducive to justice. If it appear, therefore, that the plaintiff has overreached the defendant, or has taken advantage of his ignorance or inexperience, or has driven a "hard bargain" with him,—in short, if it appear that he has not exercised entire good faith towards the defendant in obtaining the contract, though he have been guilty of no such fraud as would prevent his recovering at law, yet equity will leave him to such damages as a jury will give him.

Thirdly, equity considers it as unjust for a defendant to be kept in uncertainty and suspense as to whether he will be required to perform the contract or not; as to whether, *e. g.*, he is to keep his estate or convey it to the plaintiff. In particular, equity considers it as unjust for the plaintiff to speculate at the defendant's expense,—to sue at law or in equity, according as events happening after the breach of the contract render specific performance or damages most for his interest. If, therefore, there is satisfactory evidence that a plaintiff is seeking specific performance only because of events which have happened since the contract was broken, the bill will be dismissed. And, even in the absence of any such evidence, a plaintiff's bill will be dismissed, on the ground of laches, unless it was filed promptly, and has been prosecuted with diligence.<sup>1</sup> The amount of delay which will constitute laches cannot, indeed, be precisely defined, as it varies according to circumstances; but the only safe course for a plaintiff who desires specific performance is to use as much diligence as is reasonably practicable.

The power of a court of equity to enforce specific performance is of course limited by the defendant's ability to perform; nor can a defendant be imprisoned for not performing a decree which he is unable to perform, as he is guilty of no contempt. If, therefore, the coöperation of a third person be necessary to the performance of a contract, it is a sufficient excuse for the defendant that such third person refuses to coöperate, even though the defendant expressly bound himself to procure his coöperation; and this rule holds, even though the third person be the defendant's wife. Mere poverty, however, is not an inability which any court can recognize; and therefore inability is never an excuse for not performing a decree for the payment of money.

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<sup>1</sup> If, however, a vendee of land be in possession of the land *under the contract*, the rule stated in the text will not apply. *Mills v. Haywood*, 6 Ch. D. 196, 202.



An inability in a vendor to make a good title is a legal (not a physical) inability to perform the contract ; and therefore it is no excuse in the mouth of the vendor for not doing all the physical acts necessary for the performance of the contract. It is an excuse, however, in the mouth of the vendee for not performing the contract on his part. Moreover, the court takes upon itself the burden of ascertaining whether the vendor has such a title as the vendee is bound to accept ; and that, too, whether the vendor or the vendee be plaintiff in the suit. Thus, if the vendor be plaintiff, he is not required either to allege or to prove that his title is good, nor is the vendee required to allege or prove the contrary ; but the pleadings and proofs assume that the plaintiff is able to make a good title ; and, if the questions raised by the pleadings and proofs be decided in the plaintiff's favor, a decree is made that the contract be specifically performed, provided the plaintiff be able to make a good title, and that the cause be referred to a Master to ascertain and report whether a good title can be made. So, though the vendee be the one who seeks specific performance, he is not regarded as submitting to perform on his part, except upon condition that he can have a good title ; and, therefore, if a decree be made in his favor, it must be in the same form as when the vendor is plaintiff, unless the vendee declare himself satisfied with the vendor's title, and waive any reference to a Master in regard to it. The result is, therefore, that a reference as to title is an incident to every specific performance in equity of a contract for the purchase and sale of land, unless such reference be waived by the vendee.

If a vendor be able to make a good title to a part of the land sold, but not to the remainder, the vendee will be entitled, at his option, to a specific performance as to the former, and to have the relative value of the latter deducted from the purchase-money. So if the vendor's title be defective as to the whole of the land, and the vendee elect notwithstanding to have the contract performed, the latter will be entitled to have a deduction made from the purchase-money on account of the defect of title, provided the amount to be deducted can be ascertained with reasonable accuracy. Thus, if the land be merely subject to a pecuniary encumbrance (*e. g.*, an ordinary mortgage), the vendee will be entitled to have the amount of the encumbrance deducted from the purchase-money, he indemnifying the vendor against the encumbrance. So

if a vendor, who has contracted to convey the fee-simple, have only an estate for life or lives, or for years, the amount which ought to be deducted from the purchase-money, on account of the defect of title, can be ascertained without difficulty. But where the defect in the vendor's title is of such a nature that there are no definite data by which to estimate the amount that ought to be deducted from the purchase-money on account of it, the vendee will not be entitled to specific performance, except upon the terms of paying the full amount of the purchase-money.<sup>1</sup>

A vendor may be unable fully to perform his contract in consequence of something that has happened to the property since the making of the contract, as where the subject of sale is land and buildings, and, after the making of the contract, the buildings are destroyed by fire. In such a case the vendee will be entitled, at his option, to have a conveyance of the land, with a deduction from the purchase-money of the relative value of the buildings.

Are there any cases in which a plaintiff, who cannot recover on a contract at law, can nevertheless have a specific performance in equity? To say that there are such cases would seem at first sight to be equivalent to saying that a plaintiff who has no legal right may sometimes recover in equity upon the ground that he has a legal right. The law may, however, refuse to recognize a right, because, if a right were recognized, the law would have no adequate means of enforcing it, or no means of enforcing it without giving the plaintiff more than he would be entitled to, and thus doing injustice to the defendant; and, in such a case, if the reason why the law refuses to recognize the right does not exist in equity, the right may be recognized in equity without any violation of law, though in strictness the right will then be equitable, — not legal. At all events, there is an important class of cases in which equity, rightly or wrongly, gives relief to the party in whom the legal right created by the contract is vested, though, confessedly, such party could not recover in an action at law. The cases referred to are those in which, the contract being bilateral, the covenant or promise of the defendant is subject to the implied condition that the plaintiff's covenant or promise shall be performed either before the defendant's or concurrently with it. If the condition be express, and the plaintiff break his covenant or promise (*i. e.*, break the condition on which the defendant's cove-

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<sup>1</sup> See *infra*, page 373.

nant or promise depends) in ever so slight a degree, he can never recover against the defendant, either at law or in equity. The reason is obvious, namely, that by the terms of the contract no performance is due to the plaintiff. And the rule at law is the same, though the condition be implied, so long as no part of the contract has been performed. But if the plaintiff have performed his covenant or promise in part before committing any breach of it, the implied condition is then modified, and only requires the plaintiff to perform his covenant or promise so far as is essential to its main scope and object ; and the only effect of a breach by the plaintiff in points not essential will be (not to disable the plaintiff from enforcing the defendant's covenant or promise, but) to enable the defendant to recover damages against the plaintiff for the breach. In equity, on the other hand, a breach by the plaintiff of his own covenant or promise, if it be only in points not essential, will not disable the plaintiff from enforcing the defendant's covenant or promise, even though no part of the plaintiff's covenant or promise have been performed, unless performance by the plaintiff be made by the contract an express condition of performance by the defendant. In justification of this difference between law and equity, it may be said that when a plaintiff, who has broken his own covenant or promise, is permitted to enforce at law the covenant or promise in his favor, no allowance can be made to the defendant for the plaintiff's breach, but the plaintiff will recover as if he had fully performed on his part, and the defendant must indemnify himself by suing the plaintiff in turn. In equity, on the other hand, the compensation in money to which the defendant is entitled for the plaintiff's breach will be ascertained in the plaintiff's suit, and will be deducted from the amount to be paid by the defendant, or added to the amount to be paid by the plaintiff (as the case may be); and this, too (on the principle already explained), without the necessity of the defendant's filing any cross-bill. If this difference in procedure were the only reason why the common law has a different rule from that which prevails in equity, the justification of equity would be complete; but it may be alleged in support of the common-law rule (with what force the writer will not presume to say) that courts are just as much bound by an implied condition as they are by an express condition, unless some event has happened since the making of the contract which introduces a new element into the case.

The rule in equity being, however, as stated above, it often happens that bills for specific performance are filed by parties who have themselves broken the contracts on which they sue; and as often as this is the case the question arises whether the plaintiff's breach goes to the essence or not. In case of an obligation merely to pay money, a breach can never go to the essence, as interest on the money is always, in legal contemplation, full compensation for the breach. Therefore, a purchaser of land can never lose the right to specific performance by a mere breach of the contract, though he may easily lose it by delay or laches. In case of an obligation to give a specified thing, a breach by the plaintiff may consist either in a failure to give the thing on the day when by the contract it is due, or in a failure to give some portion of it at all, or to give it in the condition in which it was agreed to be given. A breach of the first kind is a breach in time merely, and generally such a breach does not go to the essence. For example, it is not presumably of vital importance to the purchaser of an estate whether he get the estate to-day or to-morrow, or even whether he get it this year or next. It is always open, however, to a purchaser to show that he purchased the estate with a particular object in view, which object was known to the seller, and that that object has been defeated by the seller's delay in performing the contract; and then the seller's breach will go to the essence. So time may, it seems, be of the essence of a contract for the purchase and sale of property from the nature of the property, *e.g.*, where the property is constantly diminishing in value, as a life interest, or constantly increasing in value, as a reversionary interest. So if a contract contain an express declaration that time shall be of its essence, such declaration will be binding upon the court; for the only ground upon which a court can hold that any given breach does not go to the essence (or rather, perhaps, that any given breach of an implied condition by the plaintiff does not disable him from enforcing the contract against the defendant) is the intention of the parties, actual or presumed. Such a declaration has, therefore, the same effect as that of making the performance of the contract by each party expressly conditional upon its performance by the other party.

It is often said that time is not of the essence of a contract in equity, as if equity differed from law in that respect; but that is a mistake. Whatever is of the essence of a contract at law is

of its essence in equity also. It would be strange if it were not so, since the question is entirely one of construction, and the construction of a contract ought to be the same in all courts. The real difference between equity and law is the one already adverted to; namely, that at law it is not material whether a breach goes to the essence or not, unless there has been part-performance.

If a breach of an obligation to give a specified thing consist in a failure to give some portion of the thing at all, or to give it in the condition in which it was agreed to be given, there is no presumption that the breach does or does not go to the essence; but it seems that the defendant will always have to satisfy the court that the breach does go to the essence, in order to protect himself against specific performance. The question is always referred to a Master. The most common case is where the plaintiff, a vendor of land, is unable to perform the contract as to part of the land for want of title; and in that case the Master is directed to inquire whether the part of the land to which the plaintiff has no title is "material" to the enjoyment of the residue.

If a vendor of land be unable fully to perform his contract, not because his title fails as to a part of the land, but because there is a flaw in his title which extends to all the land, the breach will always go to the essence, however small the flaw may be, unless, indeed, it be so small as not to be a flaw at all in legal contemplation. In other words, a purchaser of land will never be compelled to accept a defective title, with a compensation in money for the defectiveness of the title. The reason seems to be that it is impossible to measure a flaw in a title by a money standard.<sup>1</sup>

If A and B make an agreement with each other for the purchase and sale of land, and A commit a breach of the agreement by failing to perform at the time agreed upon, B will be entitled at law to rescind the contract; and he will be entitled to rescind it in equity also, unless A have a right to specific performance on the ground that the breach committed by him did not go to the essence. B, therefore, immediately upon his committing a breach, may file a bill to have the contract rescinded; and A can resist a decree for rescission only by obtaining a decree for specific performance; and, in order to obtain such a decree, he should file a cross-bill.

If a contract be made for the purchase and sale of land which

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<sup>1</sup> See *supra*, page 370.

has buildings on it, and, after the making of the contract, but before the conveyance of the land, the buildings be casually destroyed by fire, upon whom will the loss fall? At law it will clearly fall upon the vendor in all cases. The buildings belong to the vendor, and *res perit suo domino*. If the loss happen before the time fixed for completing the purchase has arrived, the vendor will be unable to perform the contract on his part, and, therefore, he can never enforce it against the vendee. The vendee will not, indeed, be able to enforce the contract against the vendor either, because the act of God will excuse the latter from performing his contract *qua* contract, though it cannot relieve him from the consequences of failing to perform it *qua* condition. The contract, therefore, will never be performed, nor will any liability be incurred for not performing it. Each of the parties to the contract will, therefore, be in the same situation as if the contract had never been made. If, on the other hand, the loss happen after the time fixed for completing the purchase is past, it will equally follow that the contract will never be performed, for it will have been broken by either the vendor or the vendee, or by both. If broken by the vendor, his liability in damages will not be reduced by the loss; if broken by the vendee, the vendor's right to damages will not be enlarged by the loss; if broken by both parties, of course neither will be able to recover against the other, and it will be as if the contract had never been made, or as if it had been rescinded by mutual consent.

What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, *i. e.*, the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee; *i. e.*, the vendor will be able to throw the loss upon the vendee by enforcing

specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened.

Such is the rule which ought to prevail in equity, and which formerly did prevail;<sup>1</sup> but, since the time of Lord Eldon, English courts of equity have drifted into great confusion upon this subject, for they now hold<sup>2</sup> that a loss by fire which happens any time

<sup>1</sup> "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house." *Per* Sir Joseph Jekyll, M. R., in *Stent v. Bailis*, 2 P. Wms. 217, 220. The same rule was acted upon by Lord Eldon in *Paine v. Meller*, 6 Ves. 349. It is true that the purchase there was to be completed on the 29th of September, while the fire did not happen till the 18th of December following; but the time for completing the purchase had been extended by the mutual consent of the parties; and Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise.

<sup>2</sup> *Poole v. Adams*, 12 W. R. 683; *Rayner v. Preston*, 14 Ch. D. 297, 18 Ch. D. 1. In the first of these cases, Kindersley, V. C., seems to have supposed that he was following the common-law rule; for he said it was "clear that the contract remained good at law [*i. e.*, notwithstanding a loss by fire before the time for performing the contract arrived], and that the purchaser might have been sued for breach, in refusing to complete and pay his purchase-money." It seems impossible to reconcile either of the two cases just cited with that of *Counter v. Macpherson*, 5 Moo. P. C. 83. In the latter case, there was an agreement for a lease of land and buildings by the plaintiff to the defendants. Before the lease was made, the buildings were partly destroyed by fire. The fire happened after the day fixed for performing the agreement, *i. e.*, for making the lease, but the time had been extended by mutual consent (as in *Paine v. Meller*, *supra*), and at the time of the fire there had been no breach of the contract by either party; and the court held that the plaintiff was entitled to specific performance only upon the terms of restoring the buildings to the condition in which they were before the fire, and in other respects performing the contract on his part. Hence it was held that the loss fell upon the plaintiff as well in equity, as at law; and the court declared that upon such a question equity had no rule of its own, but followed the law. It is true that the defendant's obligation to perform was conditional on performance by the plaintiff, but so it was in all the cases in which this question has arisen. In all of them alike, too, the condition was implied,—not express. This was emphatically the case in *Counter v. Macpherson*, as there was there no formal writing whatever, the agreement having been made out entirely by letters written by the parties respectively to each other.

It is also true that the agreement in *Counter v. Macpherson* contained a condition precedent, to be performed by the plaintiff; but, in respect to the question under consideration, there is no difference between a condition precedent and a concurrent condition. Moreover, every vendor of land has a condition precedent to perform, according to the English practice, namely, that of showing a good title.

Finally, it is true that one of the conditions to be performed by the plaintiff in *Counter*

after the *making* of the contract falls upon the vendee, thus holding in effect that the performance of a contract enforced in equity relates back to the time of making the contract. Such a doctrine appears sufficiently extraordinary without adverting to its consequences. When an act done at one time relates to a different time, the relation is, of course, a legal fiction; and the only justification for the adoption of a legal fiction is that thereby more perfect justice can be done. In regard to the performance of a contract, the perfection of justice consists in its being performed at the time fixed in the contract for its performance; and therefore the reason is obvious why a performance enforced in equity should relate to that time; but what possible reason can exist for making such a performance relate to the time of making the contract, *i. e.*, to a time when neither party was bound either to perform or to accept performance? Such a relation is, in its consequences, much worse than no relation at all; for the worst consequence of the latter would be that the law would not succeed in doing perfect justice, while the consequence of the former may be that the law will inflict the greatest injustice. For example, what greater injustice could be inflicted than by shifting the consequences of an act of God from A, upon whom it has fallen, to B, upon whom it did not fall,—who was confessedly in no way responsible for the act, and who has done no wrong whatever to A, whether by committing a tort or by breaking an obligation? Moreover, the English courts do not carry out their doctrine to all its legitimate consequences. For example, to be consistent, they ought to require a vendor to account to the vendee for the rents and profits of the land from the time of making the contract, and they ought to require the vendee to pay interest on the purchase-money from the same time; and yet the time from which they actually require both is

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*v. Macpherson* was of a kind not often found except in agreements for leases, namely, the repairing of the existing buildings and the erection of a new building; but that introduced no new element into the case. Had there not been such a condition, there would have been another, namely, that of leasing the property in the condition that it was in at the date of the agreement; and the effect of damage by fire upon each of these conditions is the same, namely, that of making it impossible for the owner to perform the condition without repairing the damage caused by the fire.

Upon the whole, there appears to have been but one material distinction (though that was a decisive one) between *Counter v. Macpherson* and *Paine v. Meller*; namely, that in the latter the plaintiff had apparently performed upon his part, and the defendant was in default, while in the former the plaintiff had not fully performed on his part, and so, of course, the defendant was not in default.



the time fixed for the performance of the contract. It is not difficult to understand why they have not gone wrong upon these latter points. To require a vendee to pay interest on the purchase-money before the principal is due, would be too palpable a disregard of the terms of the contract ; and of course it would not do to require the vendor to account for the rents and profits of the land, unless he is to receive interest on the purchase-money. Moreover, the computing of interest on purchase-money and the taking of accounts of rents and profits of lands are matters of daily experience in cases of specific performance, as to which the practice has never changed, and as to which the established forms of decrees have prevented the courts from going astray. But what has blinded the courts to the obvious fact that, in cases of specific performance, the time from which interest is to be computed, and the rents and profits accounted for, is the time to which the performance relates ?<sup>1</sup> One answer to this question may be found in the notion which has extensively prevailed, that a contract to convey land is in equity an actual conveyance ; that there is in equity no difference between an actual conveyance and a contract to convey.<sup>2</sup>

<sup>1</sup> "If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase-money with interest from that time." *Per* Lord Eldon, in *Paine v. Meller*, 6 Ves. 349, 352.

<sup>2</sup> The obstinacy of this error is strikingly illustrated by the case of *Hughes v. Morris*, 2 De G. M. & G. 349, where it was decided that a purchaser of shares in a British vessel could not have specific performance of the agreement for the purchase and sale, because such agreement did not conform to the requirements of the Registry Act respecting the actual transfers of vessels, the court holding that specific performance would make the purchaser a part-owner of the vessel in equity from the date of the agreement, and thus violate the provisions of the statute. Knight-Bruce, L.J., said (p. 355) : "What the legislature had in view was not merely the passing or not passing of what we call the legal estate, but that whenever property in a vessel should be changed, it should be changed in a particular way. Now, whether there is a sale, or a contract for a sale, can make no difference. A contract for a sale is, in the view of a court of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is, in the view of a court of equity, *for many purposes*, held to be done." Lord Cranworth, L.J., also said (p. 358) : "The provision of the act being that a transfer shall not be valid for any purpose whatsoever, the argument is that a contract, although not valid to transfer the property, may make a party to it the owner in equity. That would be to get rid of the whole policy of the statute, namely, that there should be the means of tracing from the original grand bill of sale the ownership for all time. But if the doctrine be right that is contended for, this need not appear in any document from the very first sale." It will be seen, therefore, that the view of the court was that to allow specific performance of agreements for the purchase and sale of British vessels would be to enable owners of such vessels to nullify the Registry Act by separating the beneficial from the legal ownership, just as owners of land formerly nullified the

But how did such a notion ever become prevalent? It derives no countenance from anything that is actually done in suits for specific performance; and yet it is only in suits for specific performance that it can ever be maintained that the ownership of land has been changed in equity by a mere agreement to change it. Perhaps the notion originated partly in a mere misunderstanding of the rule that a performance of a contract enforced in equity relates back to the time when it ought to have been performed; for it has been common to express that rule by saying that whatever is agreed to be done is considered by equity as done. It is believed, however, that the notion had its chief source in the doctrine of equitable conversion, *i.e.*, in the doctrine that land will sometimes be regarded by equity as converted into money and money into land, though no conversion have in truth taken place. This doctrine has been adopted for the purpose of giving effect to the intentions of the owners of property in regard to the destination of their property after their deaths. Thus, if a testator by his will direct a certain piece of land to be sold after his death,

law relating to the legal ownership of land by separating the use of the land from the land itself. And if it be true that an agreement to convey is, in equity, an actual conveyance, the view of the court was right. It is certain, however, that a mere agreement to convey is very far from being, in equity, an actual conveyance. It is only by specific performance that equity ever converts an agreement to convey into an actual conveyance. By specific performance, however, equity converts an agreement to convey into an actual conveyance at law as well as in equity. How, then, can specific performance impart to an agreement to convey any further effect or operation in equity than it has at law? Only by making the performance of it relate back. Even, therefore, if equity made every performance (whether compulsory or voluntary) of an agreement to convey relate back to the date of the agreement, it would by no means follow that an agreement to convey would, in equity, be an actual conveyance. The operation of such an agreement in equity would still be wholly dependent upon its operation at law, *i.e.*, it could never operate in equity unless and until it operated at law. Since, then, it is only such conveyances as are actually enforced in equity that relate back, and since, of all the conveyances that are made (even of land), not one in a million is enforced in equity, the statement that an agreement to convey is in equity an actual conveyance seems extraordinary.

If it be said that the actual decision in *Hughes v. Morris* does not involve the proposition that an agreement to convey is in equity an actual conveyance, and that the decision may be supported upon the ground that the agreement there in question, if it had been enforced, would have become by relation a conveyance in equity from the date of the agreement, or at least from the time fixed for the performance of the agreement, and would thus have violated the statute, the answer is, that such a relation, as it is a mere fiction, created by equity for the purposes of justice, is entirely within the control of equity; that such a relation, though a usual incident of a conveyance enforced in equity, is by no means a necessary incident of such a conveyance; that whenever, therefore, such a relation would work injustice or violate a statute, it should be disallowed; in short, that if such a relation was the only objection to specific performance

but make no disposition of either the land or its proceeds, though the land will at law descend to the testator's heir, yet the executor will in equity be entitled to have it sold, and, when sold, the purchase-money will in equity be part of the personal estate. And even though the testator, in the case supposed, devise "all his land" to A, yet A will take no more than a naked legal title to the piece of land directed to be sold. Nor is a will the only means by which an owner of property can effect an equitable conversion of it. He can also convert his land into money by a contract to sell the former, and he can convert his money into land by a contract to buy land; and if he died intestate after making such a contract, though before performance of it, his heir may, in the one case, be compelled by the executor to convey the land, though the purchase-money will go to the executor, while, in the other case, the executor may be compelled by the heir to pay for the land, though the land will be conveyed to the heir. Moreover, this equitable conversion undoubtedly takes place the moment the

of the agreement in question, the consequence was, not that specific performance should be refused, but that specific performance pure and simple should be granted, *i. e.*, specific performance without any relation back. Such, it seems, should have been the decision; for as the statute prohibited any transfer of ownership in a British vessel, whether at law or in equity, except in the mode prescribed, it followed that the contract in question could not create any equitable ownership in the vessel (*McCalmont v. Rankin*, 2 De G., M. & G. 403; *Coombes v. Mansfield*, 3 Dr. 193; *Liverpool Borough Bank v. Turner*, 1 J. & H. 159, 2 De G., F. & J. 502); but if, as the court assumed, the contract created a legal right, it was no more a violation of the statute to enforce that right in equity by giving specific reparation than to enforce it at law by giving damages.

Upon the whole, it seems that the court, in dismissing the bill, did proceed upon the idea that an agreement to convey is in equity an actual conveyance; that the consequence of enforcing the agreement in question would be to make it an actual conveyance in equity from its date, and that, too, not by relation, but independently of relation; that the operation of a contract as a conveyance in equity was not a consequence of specific performance, but that the latter was a consequence of the former; that the question, therefore, which the court had to decide was not whether equitable relief should be given for the violation of a legal right, but whether the agreement could, without a violation of the statute, create an equitable right in the plaintiff, and impose an equitable obligation upon the defendant, *i. e.*, create between the plaintiff and the defendant the relation of trustee and *cestui que trust*.

It would seem to be a sufficient answer to such a view to say that, if it be well founded, a vendee of land has no occasion to file a bill for specific performance, promptly or otherwise; that he may always base his right to go into equity upon his character of *cestui que trust*; that, instead of filing a bill for specific performance, he may, *e. g.*, file a bill for an account. Indeed, a bill for an account would possess at least one signal advantage over a bill for specific performance, namely, that it would require no performance by the plaintiff, *i. e.*, that the plaintiff's right to an account would not be at all affected by the fact that he had not paid the purchase-money.

contract is made ; *i. e.*, the conversion, when actually made, will relate back to the time when the contract was made. Why ? Because the equitable conversion depends upon the intention of the owner of the property, as shown by his making the contract. But this, surely, has nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any right, nor is subject to any duty. In a word, it is not the contract *qua* contract that effects the equitable conversion, but the contract as expressing the intention of one of the parties to it in reference to a matter within his exclusive control.

We now come to the subject of the jurisdiction of equity over legal duties which do not amount to obligations. Although any failure to perform a duty of this kind (as it is not a breach of obligation) is a tort, yet, as it consists merely in non-feasance, it is closely analogous, in respect to equity jurisdiction, to a breach of an affirmative contract or other affirmative obligation. For example, as equity cannot prevent the latter, so neither can it the former ; and therefore specific reparation is the utmost relief that equity can give in respect to the former, as it is in respect to the latter. There are, however, important differences in respect to equity jurisdiction between affirmative contracts and legal duties, whether the latter amount to obligations or not. For example, all legal duties (or at least all that equity would ever attempt to enforce) are unilateral, and therefore the enforcement of them never involves any of those difficulties which are peculiar to bilateral contracts. On the other hand, legal duties generally consist only in doing, while affirmative contracts consist in giving as well ; and, as the jurisdiction of equity over affirmative contracts is mostly confined to those which consist in giving, it follows that the exercise of this latter jurisdiction will seldom furnish a precedent for equity's assuming jurisdiction over legal duties. Indeed, the difficulty which equity experiences in enforcing a specific reparation which consists in doing is precisely the same, whether the thing to be repaired be the breach of an affirmative contract or of a legal duty, or be a tort which consists in mis-feasance, assuming, of course, that the latter is one which is in its nature capable of

being specifically repaired ; and, therefore, the rule, as to equity's assuming jurisdiction, ought to be, and generally is, the same in all these cases. And hence it follows that, as equity will seldom enforce specific reparation of a tort which consists in mis-feasance, or of the breach of an affirmative contract which consists in doing, so it will seldom enforce a specific reparation of a breach of a legal duty. For example, an owner of a particular estate in land is subject to the legal duty of keeping the estate in repair, and a breach of that duty constitutes that species of tort called permissive waste ; but as equity will not enforce specific reparation of a breach of a contract to repair, so it has been long settled that equity will not enforce specific reparation of permissive waste.<sup>1</sup>

It has been shown on a previous page<sup>2</sup> that equity might enforce specific reparation of torts which consist in mis-feasance in many cases in which it has hitherto declined to do so, and that it ought to do so whenever a specific reparation is necessary for the purposes of justice. And the same argument is applicable to breaches of affirmative contracts which consist in doing,<sup>3</sup> and to breaches of legal duties.

In the foregoing observations upon the jurisdiction of equity over legal duties, reference has been had to such legal duties only as are imposed by the common law. There are important legal duties imposed by the canon law ; but the jurisdiction of equity over these depends upon different considerations from those hitherto presented, and the treatment of it will therefore be postponed until we come to the jurisdiction of equity over canon-law rights.

As the jurisdiction of equity over those torts which consist in non-feasance (*i. e.*, negative torts) is analogous to its jurisdiction over affirmative contracts, so the jurisdiction of equity over those contracts which consist in non-feasance (*i. e.*, negative contracts) is analogous to its jurisdiction over torts which consist in mis-feasance (*i. e.*, affirmative torts).

In respect to the mode in which equity exercises its jurisdiction over them respectively, the analogy between a negative contract and an affirmative tort is perfect. Thus, the ordinary mode of exercising equity jurisdiction over each is by granting an injunc-

<sup>1</sup> See *Lord Castlemaine v. Lord Craven*, 22 Vin. Abr. 523, pl. 11.

<sup>2</sup> *Supra*, pp. 128, 129.

<sup>3</sup> See *Clark v. Glasgow Ass. Co.*, 1 MacQueen, 668, 670.

tion to prevent a breach of the one or a commission of the other, and it is this mode alone which measures the extent of the jurisdiction which equity will exercise over each. So if a negative contract have already been broken, or if an affirmative tort have already been committed, the only relief that equity can give (except incidentally), either for the breach of contract or for the tort, is specific reparation; and the reasons for giving or withholding that relief are the same as to each. Finally, if an injunction be granted to prevent the breach of a negative contract or the commission of an affirmative tort, equity will incidentally give relief, in the one case, for any breach of the contract already committed, and, in the other, for any tort already committed, if the case be one which admits of any relief which equity can give, *e.g.*, an account of profits; and the principle upon which equity gives such incidental relief is the same in each case, namely, that of preventing a multiplicity of suits.<sup>1</sup>

In respect, however, to the extent of the jurisdiction exercised by equity over them respectively by way of prevention, and the

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<sup>1</sup> In respect to the jurisdiction of equity over breaches of contract already committed, there is no analogy between affirmative and negative contracts. In strictness there can be but one breach of an affirmative contract, as the slightest breach of such a contract is a breach of the entire contract, and puts an end to it. There can, in strictness, therefore, be no performance of any part of an affirmative contract which has once been broken. This is true even of those contracts which require the performance of a series of acts, apparently independent of each other. For example, though a contract for the purchase and sale of chattels provide for a delivery in instalments, yet a breach as to any instalment will be a breach also as to all subsequent instalments.

As an affirmative contract admits of but one breach, so it can create but one cause of action. Therefore, if an action at law be brought for a breach of an affirmative contract, damages will be given upon the whole contract, and the judgment in that action will be a bar to any future action. Hence, if equity assume jurisdiction over such a contract at all, it must assume jurisdiction over the entire contract, and give full relief. It cannot give relief as to a part of the contract, and leave the plaintiff to sue at law as to the remainder. It would be a wrong to a defendant to permit a single cause of action to be made the subject of two actions against him. Moreover, equity can never permit an action at law to be brought upon a cause of action which has been the subject of a decree in equity.

A negative contract, on the other hand, may be capable of an indefinite number of breaches, each breach constituting a separate and independent cause of action. In such a case, therefore, it does not follow, because equity has jurisdiction to prevent breaches in future, that it has jurisdiction, also, over breaches already committed.

It must be admitted that legal duties are analogous to negative contracts in respect to the number of breaches of which they are capable. Yet, as equity seldom assumes jurisdiction over legal duties, and never prevents breaches of them, it will rarely happen that the jurisdiction of equity will be affected by the fact that a legal duty is capable of an indefinite number of breaches.

reasons for which it is exercised, there is little analogy between a negative contract and an affirmative tort. If, indeed, a negative contract consist in not doing an act the doing of which equity would prevent as a tort, then equity will also prevent the doing of it as a breach of contract. For example, if a tenant covenant with his landlord not to commit waste on the demised premises, the landlord can have an injunction against the committing of waste by the tenant, either on the ground that it would be a tort, or on the ground that it would be a breach of contract. But the converse of this does not hold ; for equity will frequently prevent the breach of a negative contract, though it consist in not doing an act which is not such a tort as equity will prevent, or (which is generally the fact) is not a tort at all.

Nor is there much analogy between negative and affirmative contracts, in respect either to the extent of the jurisdiction exercised by equity over them, or the reasons for its exercise. It is doubtless true that the mere fact of a contract being negative is never in itself a reason why equity should not exercise jurisdiction over it ; and, therefore, cases may possibly arise in which equity will enforce a negative contract, and yet proceed independently of the fact that the contract is negative ; but such cases will be very rare. And yet the jurisdiction exercised by equity over negative contracts is much more extensive than that exercised over affirmative contracts. Whenever, therefore, equity exercises jurisdiction over a negative contract, it will be found to be almost invariably true that the jurisdiction rests entirely upon the fact that the contract is negative. In what cases, then, will equity assume jurisdiction over a contract upon the single ground that it is negative ? First, it seems that equity will always restrain a breach of a unilateral covenant or promise, if it be negative ; for, if a covenant or promise is unilateral, it follows that the consideration for it has already been received, *i. e.*, that the covenant or promise has been fully paid for ; and, as equity can restrain a breach of a negative covenant or promise without difficulty, it is not thought consistent with justice to permit a person who has given such a covenant or promise, and who has the consideration for it in his pocket, to break his covenant or promise at his pleasure, and thus to leave the covenantee or promisee to such indemnity as he can obtain by an action for damages,—a remedy which may prove worthless, after the expense of obtaining a verdict and judg-

ment has been incurred, because of the insolvency of the defendant.<sup>1</sup> Secondly, though a negative covenant or promise constitute one side of a bilateral contract, yet if the negative covenant or promise be not dependent upon the covenant or promise which constitutes the other side of the contract, it seems that equity will restrain a breach of the former. In such a case, as the performance of the negative covenant or promise is absolutely due to the covenantee or promisee, the effect is the same as if the negative covenant or promise were unilateral, so far as regards the question now under consideration.<sup>2</sup> Thirdly, though a negative covenant or promise constitute one side of a bilateral contract, and be dependent upon the covenant or promise which constitutes the other side of the contract, yet, after full performance of the latter, equity will restrain a breach of the former; for, when one side of a bilateral contract is fully performed, the other side becomes unilateral. Fourthly, though a negative covenant or promise con-

<sup>1</sup> "It is said that the court may execute a negative contract. I admit it. I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant on the ground that a valuable consideration had been given for it." *Per* Sir L. Shadwell, V. C., in *Kimberley v. Jennings*, 6 Sim. 340, 351. And see the observations of Lord Cottenham in *Dietrichsen v. Cabburn*, 2 Ph. 52, 57.

A common instance of a covenant which is negative and unilateral, and which, therefore, equity will enforce, is a covenant not to carry on a particular trade or business within a particular district. *Williams v. Williams*, 2 Swanst. 253, 332; *Rolfe v. Rolfe*, 15 Sim. 88; *Swallow v. Wallingford*, 12 Jur. 403; *Whittaker v. Howe*, 3 Beav. 383. And see *Lumley v. Wagner*, 1 De G., M. & G. 604, 610-611.

It seems that the defendant's agreement was unilateral in *Hills v. Croll*, 2 Ph. 60. See reporter's note, pp. 62-63. See also the report of the case in 1 Real Prop. and Conv. Cases, 541, 553. Undoubtedly the defendant would have been at liberty to purchase acids elsewhere, unless the plaintiff would supply him with acids; but that seems to have been no valid objection to granting an injunction against the defendant's purchasing acids elsewhere, provided the plaintiff would supply him. See 1 Real Prop. and Conveyancing Cases, 541, 555.

The case of *Catt v. Tourle*, L. R. 4 Ch. 654, furnishes another instance of a covenant held to be enforceable in equity, because it was negative and unilateral. There, also, the defendant would be entitled to obtain beer elsewhere, if the plaintiff did not supply him with beer of good quality and at a fair price. Hence the observation just made upon *Hills v. Croll*, in respect to the form of the injunction, is applicable also to this case.

<sup>2</sup> Thus in *Kemble v. Kean*, 6 Sim. 333, the defendant made an absolute and binding promise to the plaintiff, in January, 1829, not to play in London during the then current season; and it seems that that promise would have been enforced by injunction. It must be admitted, however, that such a case is not so strong as that of a purely unilateral covenant or promise.



stitute one side of a bilateral contract, and be dependent on the covenant or promise which constitutes the other side of the contract, yet, if the latter have been performed in part, and there have been as yet no breach of it, equity will restrain a breach of the former;<sup>1</sup> but if an injunction be granted in such a case, and afterwards there be a breach of the covenant or promise which constitutes the other side of the contract, the injunction will have to be dissolved, unless the covenant or promise which constitutes the other side of the contract be of such a nature that equity can enforce it.<sup>2</sup> Fifthly, if a negative covenant or promise constitute one side of a contract which is partly unilateral and partly bilateral, the negative covenant or promise will be independent of the other side of the contract, unless it be made expressly dependent; and if independent, equity will restrain a breach of it.<sup>3</sup> Sixthly, though the foregoing propositions are in terms limited to the case where a negative covenant or promise constitutes the whole of one side of a contract, yet it is immaterial, so far as regards the ques-

<sup>1</sup> *Dietrichsen v. Cabburn*, 2 Ph. 52. It seems, therefore, that the plaintiff was entitled to an injunction in *Hills v. Croll*, *supra*, though it be assumed that there was a promise on the part of the plaintiff, and even that performance by the defendant was conditional upon performance by the plaintiff. See reporter's note, pp. 62, 63-64.

For the reason stated in the text, it seems that the plaintiff was entitled to an injunction in *Fothergill v. Rowland*, L. R. 17 Eq. 132. See *infra*, p. 386, note 2.

It seems to be a fatal objection to the decision in *Lumley v. Wagner*, 1 DeG., M. & G. 604, as well as to that in *Donnell v. Bennett*, 22 Ch. D. 835, that there had been no part-performance by the plaintiff.

<sup>2</sup> See *Stocker v. Wedderburn*, 3 Kay & J. 393. There may be instances in which the practice stated in the text may be applied to affirmative covenants and promises, provided the latter be of such a nature that equity can enforce them. For example, in *Brett v. E. I. & L. Shipping Co.*, 2 H. & M. 404, if the only breach committed by the defendants had been in omitting the plaintiff's name from their advertisements, it would seem that the court might have made a decree requiring the defendants to insert the plaintiff's name in their advertisements, leave being given to the defendants to apply to the court to be relieved from such decree, in the event of there being a breach of the contract by the plaintiff.

In *Peto v. B. U. & T. W. Railway Co.*, 1 H. & M. 468, the obstacle in the plaintiff's way was that the acts which he sought to have restrained were not a breach of the defendants' contract. If there had been a covenant or promise by the defendants not to do the acts in question, it seems that the plaintiff would have been entitled to an injunction.

<sup>3</sup> A negative covenant in a lease is an instance of this. *Barret v. Blagrove*, 5 Ves. 555, 6 Ves. 104; *Hooper v. Brodrick*, 11 Sim. 47. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, L. R. 16 Eq. 433, the defendants were in effect lessees of a line of railway, the plaintiffs being the lessors.

In *Hills v. Croll*, *supra*, if the contract was not purely unilateral, it seems that it was at least partly so, in consequence of the payment of the £200 by the plaintiff; and if so, the plaintiff was for that reason entitled to an injunction.

tion of equity jurisdiction, whether a single negative covenant or promise or several negative covenants or promises constitute one side of a contract. Seventhly, it will be no objection to enforcing a negative covenant or promise in equity that such covenant or promise constitutes only a part of one side of a contract, the remainder being affirmative, if the latter be of such a nature that equity can enforce that also;<sup>1</sup> or if the negative part be so separate and distinct from the affirmative part that the former ought to be performed, whether the latter be performed or not;<sup>2</sup> or if there have been as yet no breach of the affirmative part;<sup>3</sup> but if an injunction be granted on this latter ground alone, it will have to be dissolved in the event of the affirmative part being afterwards broken.<sup>4</sup>

Care must be taken not to assume unwarrantably that a contract contains a negative covenant or promise; for it does not follow, because a breach of a covenant or promise may consist of acts of mis-feasance, that therefore the covenant or promise is negative. Accordingly it seems that there was no negative promise in *Smith v. Fromont*;<sup>5</sup> and that fact alone was a sufficient ground for refus-

<sup>1</sup> It seems that equity had no jurisdiction over the affirmative part of the defendant's contract in *W. & W. Railway Co. v. L. & N. W. Railway Co.*, *supra*.

<sup>2</sup> Such was in terms the nature of the negative promise in *Kimberley v. Jennings*, 6 Sim. 340; but the court held that, if such was its true construction, it was so hard a bargain that equity would not enforce it. In *Rolfe v. Rolfe*, 15 Sim. 88, it does not appear that there was an affirmative covenant by the defendant, William Rolfe, to serve the plaintiff as a cutter; but, even if there were, the negative covenant was wholly distinct from it. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, *supra*, in *Donnell v. Bennett*, *supra*, in *Brett v. E. I. & L. Shipping Co.*, *supra*, in *Hooper v. Brodrick*, *supra*, and in *Fothergill v. Rowland*, *supra*, it seems that the affirmative covenants covered all the ground that was covered by the negative covenants, but not that alone; that, therefore, though every breach of the negative covenant in each of those cases would be also a breach of the affirmative covenant, the converse was not true. In all such cases, it seems that equity may enforce the negative covenant, though the affirmative covenant be broken, and equity be not able to enforce that.

<sup>3</sup> *Morris v. Colman*, 18 Ves. 437; *Dietrichsen v. Cabburn*, *supra*.

In *Kemble v. Kean*, *supra*, and in *Lumley v. Wagner*, *supra*, the defendant's covenants were both affirmative and negative, both the affirmative and the negative parts had been broken, the court had no jurisdiction over the affirmative parts, and the affirmative and negative parts were so inseparably connected that the latter could not properly be enforced unless the former were performed. The decision, therefore, in *Lumley v. Wagner* ought, it seems, to have followed that in *Kemble v. Kean*. A consequence of the decision in the plaintiff's favor was that a part of the contract was enforced after the contract was at an end, and after a right had accrued to the plaintiff to recover full damages for its breach. Moreover, the defendant still remained liable for full damages at law, notwithstanding the decision against her in equity.

<sup>4</sup> See *supra*, page 385, and note 2.

<sup>5</sup> 2 Swanst. 330.

ing an injunction. Whether a covenant or promise is affirmative or negative does not necessarily depend, however, upon the terms in which it is expressed; for it may in truth be negative, though it contain no negative terms. For example, in *Clarke v. Price*,<sup>1</sup> if the true construction of the contract was, that while the defendant was not bound to report cases for publication, yet if he did do so the plaintiff was entitled to publish them on the terms specified in the contract, it would seem to follow that the defendant's promise was purely negative, *i. e.*, not to employ any other person than the plaintiff as a publisher, and not to be his own publisher; and hence that an injunction ought to have been granted.<sup>2</sup> The same observation is also applicable to the case of *Baldwin v. So. for Diffusion of Useful Knowledge*.<sup>3</sup> So, in *Hills v. Croll*, the defendant's promise would seem to have been purely negative, namely, to buy of no one but the plaintiff, and to sell to no one but the plaintiff; and, if so, the injunction clearly ought to have been granted. In *Hooper v. Brodrick* there would seem to have been an implied negative agreement not to use the house for any other business than inn-keeping, provided a license could be obtained. In *W. & W. Railway Co. v. L. & N. W. Railway Co.*, though the agreement was wholly affirmative in form, it was partly negative in effect; and the same thing is true of *Fothergill v. Rowland*. Finally, in *Catt v. Tourle*, the agreement, though affirmative in form, was wholly negative in effect.

*C. C. Langdell.*

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<sup>1</sup> 2 Wilson, 157.

<sup>2</sup> The agreement between the parties, as finally modified, was for the sale to the plaintiff of all the cases that the defendant should report, at a fixed price, namely, £ 7 for every sheet of 16 printed pages.

<sup>3</sup> 9 Sim. 393.

[ *To be continued.* ]

## THE NATURE OF A POLICY OF INSURANCE WITH REGARD TO ITS ASSIGNABILITY.

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THE contract of insurance<sup>1</sup> is defined as a contract by which the insurers agree to indemnify the person assured from any loss which he may sustain by reason of the perils insured against. Such is the uniform construction which courts of law put upon this contract without exception or qualification, whether the insurance relates to fire or marine perils. It has been said that the contract is not merely a contract of indemnity only, but a personal contract to indemnify the person originally insured: "it is not a contract to indemnify any one whatever, who may become interested in the subject insured during the continuance of the risks."<sup>2</sup> In the course of mercantile transactions, it is very common for policies of insurance to be assigned; and the question immediately occurs: if the contract is a personal contract, if in its nature the insurers only agree to indemnify the person originally insured in case he suffers loss in the subject insured, how is it that the contract may be assigned, that is, how can the assignee acquire the right to be indemnified for loss which he may suffer from the perils insured against? To attempt to answer this question is the subject of this article.

It is obvious that the contract of insurance may be assigned in one of two ways. In the first place, the policy may be assigned without the assignment of the property insured; or, secondly, the policy may be assigned together with the assignment of the property insured. The distinction is important, and must be kept in mind.

Where the assignment is of the policy only, there is no difficulty in reconciling this with the nature of a personal contract. All that is assigned in this case is the right to receive the insurance money, in case the interest of the person originally insured suffers loss from the perils insured against. The assignment is like the assign-

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<sup>1</sup> The remarks in this article are to be applied only to marine and fire insurance, not to life insurance.

<sup>2</sup> Arnould, *Marine Ins.* (6th ed.), p. 112; *Lynch v. Dalzell*, 3 Bro. P. C. 497 (1729); *Sadlers Co. v. Badcock*, 2 Atk. 554 (1743).

ment of any other chose in action. The assignee is merely the person designated to receive the insurance, and he acquires only the rights of the assignor, and is subject to all the defences which the insurers have or may have against the person originally insured. No element of the personal contract is violated, for it is of no consequence to the insurers who receives the insurance money, so long as they are free from the claims of the person originally insured.<sup>1</sup>

But where the property insured is sold, and the policy is assigned, an entirely different question is raised. In this case, the person originally insured has parted with his entire interest in the subject-matter of the contract. He can suffer no loss, for he had no interest in the property at the time of the loss. The insurers cannot indemnify him, for he has no interest which can be the subject of indemnity. That interest is in the assignee, a stranger to the contract, who is neither a party nor a privy to the original contract, and it is he who suffers the loss.<sup>2</sup> If, then, the contract can be assigned, seemingly the whole conception of a personal contract will be done away with.

This objection was clearly seen by Chief Justice Shaw in *Fogg v. Middlesex Mutual Fire Insurance Co.*<sup>3</sup> "After such sale" (says Judge Shaw, referring to the sale of the property insured), "if nothing more is done,—no surrender or exchange of the policy,—and the goods should be burnt, nobody could recover on the policy; not the original assured, for he has sustained no loss; the property was not his, and the loss of it was not his loss; not the purchaser, because he has no contract with the company. And although in popular language the goods are said to be insured against loss by fire, yet, in legal effect, the original assured obtains a guaranty by the contract that he shall sustain no damage by their destruction by fire. But in case of such sale or alienation of the insured property, the original assured having no longer any interest in the policy, except to claim a return of premium, if he will assign his policy or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract embracing all the elements of a contract of insurance between the assignee and

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<sup>1</sup> *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush. 337; *Carpenter v. Providence Washington Ins. Co.*, 16 Peters, 495 (1842); *Loring v. M'f's Ins. Co.*, 8 Gray, 28 (1857).

<sup>2</sup> *Lynch v. Dalzell* (*supra*); *Sadlers Co. v. Badcock* (*supra*).

<sup>3</sup> 10 Cush. 337.

the insurers. The property having become the purchaser's, is at his risk, and if burnt it is his loss, and he has a good original contract upon a valid consideration to guarantee him against such loss. . . . Upon each assignment perfected, there is an entire change in the contract, in the party contracted with, in the insurable interest in the property at risk, and it becomes an insurance on the property of the assignee, and ceases to be a contract of insurance of the property of the assignor."

If, of course, in all cases, a new premium note was given to the insurance company by the assignee of the contract at or before the time of the assignment of the policy, these remarks of Chief Justice Shaw would be perfectly adequate to explain the liability of the company to the assignee of the contract. But this is by no means always done. How, then, can the liability of the insurance company to the assignee be explained? Where is the consideration for their new contract?

Chief Justice Shaw has also offered a possible explanation of this case too. "The exemption of the insurer from further liability to the vendor, and the [retention of the] premium paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee."<sup>1</sup>

It is hard to see how the person originally insured has any claim upon the insurance company for a return of the premium paid for a term not yet expired. Apart from any special agreement for the return of premium, his claim will rest entirely upon a failure of consideration; and there has been no failure of consideration here, either partial or total. The contract in favor of the insured still exists after the assignment of the property, and if subsequently any interest in the subject-matter of the insurance becomes vested in the insured during the continuance of the policy, the insured will be protected from any loss to his interest.<sup>2</sup>

Yet the suggestion, that the exemption of the insurer from further liability to the vendor is a sufficient consideration for the new promise, may afford an explanation of this question. It is apparent that this explanation depends entirely upon principles of novation. The argument is that the old obligation to the vendor is released in consideration that the insurer incurs a new obligation to the vendee. The writer is unable to see how this doctrine of

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<sup>1</sup> *Wilson v. Hill*, 3 Met. 66, 69.

<sup>2</sup> P. 397 (*infra*).

novation can be justified upon any principles of the common law. It is clear that it violates a fundamental principle in regard to consideration, viz., that the consideration must move from the promisee. In the present case, the promisee suffers no detriment and makes no change of position at the request of the promisor, and he has given nothing to the insurer for the benefit of the promise, so that from him there is no consideration. Furthermore, the circumstances of the transaction will hardly justify this view, even if the doctrine of novation be admitted. In their bare detail they amount to this. The property insured is sold, and the policy is handed over either with or without a written assignment. The policy is then taken by the assignee to the insurance company, and they consent to the assignment. It is sometimes customary for the assignment and the consent to be in writing, and then the consent is usually indorsed on the policy. Nothing more is done, and it is difficult to see how these facts can be construed to mean a surrender of an old obligation and the issue of a new one,—particularly as the same obligation is reissued which was issued in the first place.

But in policies like that which was transferred in *Fogg v. Middlesex Mutual Fire Insurance Co.*, there is a condition that the policy shall be void if the property be assigned. In most cases the property is assigned before the consent of the insurer is obtained, and this condition is broken, therefore, before the consent of the insurer to the assignment is obtained. The obligation of the insurers, therefore, is avoided, and hence there is no legal obligation which can be surrendered in return for the new obligation; and yet the assignment is perfectly effectual against the insurance company.<sup>1</sup>

The conclusion therefore is irresistible, that if the contract of insurance is a personal contract,—that is, a contract which is confined to an indemnity of the person originally insured,—an assignee of the contract of insurance has no rights against the underwriter. Yet a perfectly adequate explanation of the rights of an assignee is afforded if we modify this view somewhat, as is suggested in Judge Hare's notes to the "American Leading Cases."<sup>2</sup> In speaking of Judge Shaw's views (*supra*), he says:

<sup>1</sup> *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526. See *Stein v. Niagara Ins. Co.*, 61 How. Pr. 144; *Hooper v. Hudson R. F. Ins. Co.*, 17 N. Y. 424.

<sup>2</sup> 4th ed., vol. ii. p. 615.

"The mistake would seem to have originated in the supposition that a policy of insurance should be construed as if it were an engagement to indemnify the person first insured and could not be carried farther without a new contract. If the premise be conceded we must admit the conclusion, for no argument can be necessary to show that a promise to save A harmless cannot be enlarged by a transfer to B, nor enforced by him for his benefit, unless A has been injured, and then only to the extent of that injury. An assignment passes the right which the assignor has as he has it, and simply entitles the assignee to claim whatever is or may become due to the assignor. Hence, if the obligation imposed by the insurance of a house or vessel were limited to indemnifying those by whom or on whose behalf the insurance is effected, no recovery could be had after a sale, whether the suit were brought in the name of the vendor or in that of the purchaser, and whether the sale was or was not accompanied by an assignment of the policy; because it would be sufficient answer to say that the person to be indemnified had parted with his interest before the property was destroyed, and, consequently, had sustained no damage by the loss, which would be a good defence in the nature of a plea of *non damnificatus*. But if the policy is construed as a contract for the benefit, not only of the insured but of those who claim under him subsequently, as purchasers of the property and the insurance, the necessity for resorting to a new contract will disappear, and there will be no difficulty in adjusting the rights of the parties on their true basis. Thus interpreted, the operation of a policy of insurance would be somewhat analogous to that of the numerous covenants which run with land, and entitle those who claim under the covenantee by descent or purchase to the full benefit of the stipulations made by the covenantor."

In effect, then, Judge Hare's explanation is, that the agreement of the underwriters is to indemnify not only the person originally insured, but all persons who shall become legal assignees of the property and the policy. And this seems to the writer to be the true explanation.

It is obvious that this explanation accords with the intention of the parties at the time the contract is made. It cannot be said that the person originally insured contemplates only his own indemnity. He regards an insurance policy more in the nature of an insurance of the property than an insurance of his own interest in



that property, and contemplates that not only will he himself be protected from loss, but every one else who acquires his interest, and acquires the benefit of his policy. Even where there is a clause against alienation of property or policy, his conception of the policy is not changed. Insurance companies readily give their consent to the alienation, and in that case the alienee is protected.

When the property and policy have been assigned, and the insurers have consented to the assignment, if there be a condition against assignment without consent, the assignee becomes substituted to all the rights and duties of the assignor with respect to the policy. It is the assignee whose interest is insured; it is the assignee whose act will occasion a breach of condition. The assignor drops out of the contract entirely, and the assignee steps into his place with all his rights and liabilities.<sup>1</sup> No act of the assignor will then affect the rights of the assignee, but the distinction above indicated between an assignment of the policy only and an assignment of the property and policy must be carefully drawn. This distinction has become very important in the common case of an assignment of a policy by a mortgagor to a mortgagee as collateral security for the debt. After the assignment is made and consent is given, the question arises, Who is the insured? Is it the mortgagor or the mortgagee? If it is the mortgagee, it is obvious that any breach of condition by the mortgagor, as, for instance, an alienation of the equity of redemption, will not affect the mortgagee; while, if it is the mortgagor, such alienation will defeat the mortgagee. The question rests entirely upon the distinction between an assignment of the property and policy and the assignment of the policy only; and the courts, though inclined at first to protect the mortgagee, have finally adopted the view that the mortgagor is still the insured, and that his acts will avoid the policy. This view seems to be the prevailing view.<sup>2</sup>

The question arises, How far do the acts of the assignor, done before the assignment of the policy, affect the assignee? Obviously this involves the question, whether an insurance policy is negotiable or not; and it is an interesting one, though, unfortunately, one on which there is no authority. There are many *dicta* that a policy of insurance is not negotiable, and the tendency of the

<sup>1</sup> *Fogg v. Middlesex Mut. F. Ins. Co. (supra)*.

<sup>2</sup> See the cases collected in 2 American L. C. (5th ed.), pp. 891 and *seq.*

courts no doubt inclines towards this view. Yet policies of insurance and bills of exchange are frequently classed together. Says Skinner's Reports, "though neither of them are specialties, yet they are of great credit, and much for the support, conveniency, and advance of trade."<sup>1</sup> Justice Buller, in *Master v. Miller*,<sup>2</sup> upon a question in the law of bills of exchange, says, in regard to the non-assignability of a chose in action: "I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use it undoubtedly does not hold, that is, in the cases of bills of exchange and policies of insurance. The first is the present case, and bills are assignable by the custom of merchants; so in the case of policies of insurance, till the late act was made requiring the name of the person interested to be inserted in the policy, the constant course was to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it."

Policies of insurance are sometimes made payable to bearer or to order; and this would seem to point very strongly toward their being negotiable. Mr. Phillips says, in his *Treatise on the Law of Insurance*:<sup>3</sup> "A marine policy of insurance on goods seems to be precisely similar to a bill of lading as to its assignableness, provided it imports on its face a responsibility directly to the assignee of the goods, and I accordingly venture to state it as the better doctrine that the interest in a marine policy, purporting on its face to insure the owner of the goods, whoever he may be, is assignable with the goods to the effect of giving the assignee a right to make demand and bring suits upon it in his own name. And the same doctrine is, I think, applicable to a similar policy upon a vessel or one against fire upon land." Mr. Duer is of opinion that insurance policies, like bills of exchange, are negotiable, and that a *bona fide* purchaser for value will take the policy, subject, to be sure, to every legal defence which would be available against the original insured, but free from all equities existing between the original insured and the underwriter.<sup>4</sup> In fact, a continental writer goes so far as to say that policies are in their nature negotiable without special words

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<sup>1</sup> Skinner R. 55.

<sup>3</sup> Pp. 53 and 54, 5th ed.

<sup>2</sup> 4 T. R. 320.

<sup>4</sup> 2 Duer, Ins. 52.

of negotiability.<sup>1</sup> But this is disputed by Emerigon, who declares that words of negotiability are necessary.<sup>2</sup>

The writer has been unable to find any case in which an action has been brought by an assignee upon a policy payable to order or bearer. The nearest approach to it is an action upon a policy made "for whom it may concern at the time of the loss." There the action was brought by the assignee of a mortgagee whose mortgage was given subsequently to the issue of the policy. It was held that he might sue for his own loss in a court of equity; and furthermore, that inasmuch as he was a purchaser for value without notice, he was entitled to his insurance money without any deduction for unpaid premiums due from the original insured, although the insurance agent would have had a lien upon the insurance moneys as against the original insured.<sup>3</sup> Yet this doctrine was disapproved in an action upon a policy "for whom it may concern" in two early cases in Pennsylvania.<sup>4</sup> In *Gourdin v. Ins. Co. of North America* an insurance policy was likened to a bond for the payment of money, and it was held that every defence which was available against the assignor was available against the assignee, with the one exception, where the insurer was estopped from setting up the defence.

The theory of Chief Justice Shaw above cited is applied only to fire insurance, though it might be applied to marine insurance in case there was a condition in a marine policy against the assignment of the property insured. There is no inherent difference between the contract of marine insurance and the contract of fire insurance. Both are contracts of indemnity; both are personal contracts with the insured, and both are mercantile contracts ordered and controlled by the custom of merchants. Yet the courts seem to have ruled from the earliest times that, in the case of fire insurance, no assignment of the policy and property will be valid without the consent of the insurer thereto,<sup>5</sup> while in marine insurance no such consent is necessary.<sup>6</sup> But the writer ventures

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<sup>1</sup> 2 Valin, 45.

<sup>2</sup> Duer, *Ins.* p. 52, note (a).

<sup>3</sup> *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

<sup>4</sup> *Rousset v. Ins. Co. of N. A.*, 1 Binney, 429; *Gourdin v. Ins. Co. of N.A.*, 1 Binney, 430.

<sup>5</sup> *Lynch v. Dalzell (supra)*; *Sadlers Co. v. Badcock (supra)*.

<sup>6</sup> *Arnould, Marine Insurance* (6th ed.), 117; *Powles v. Innes*, 11 M. & W. 10 (1843); *Wakefield v. Martin*, 3 Mass. 558 (1801); *Earl v. Shaw*, 1 Johns. Cas. 313 (1800).

to suggest that this distinction is erroneous, in spite of numerous *dicta* to the contrary.

No case can be found in which this point has been ruled, where an express condition against assignment was not contained in the policy, and no text-writer and no court has offered any sufficient reason why this distinction should be made. The better view is that a marine policy and a fire policy do not differ at all in this respect, except that, from the earliest times, fire policies have always contained a condition against assignment, while marine policies have contained no such condition. A fire policy, therefore, is assignable in the same way as a marine policy, and no consent is necessary, unless there be a condition against assignment.

Before the Statute of 31 and 32 Victoria, c. 86, in cases of marine insurance it was the law that the assignee should sue in the name of the assignor, though the loss recovered in such an action was not the loss of the assignor, but the loss of the assignee,—an anomaly which it is very difficult to explain.<sup>1</sup> The law is the same in regard to fire insurance in many States.<sup>2</sup>

A few words remain to be said upon the point, what acts are necessary to make the purchaser of the property insured the assignee of the policy. The policy may be assigned either at the time of the sale of the property, or afterwards. If the policy is assigned at the time of the sale, it is quite clear that the assignee becomes the assured. If the property is first sold, and subsequently the policy is assigned, a question has arisen whether the assignment of the policy is effectual to protect the assignee. Of course, if the loss occurs before the assignment, neither the assignor nor the assignee can hold the insurer. But where the policy is assigned before loss, it has been contended, on the one hand, that the contract of insurance, in order to be valid, necessarily postulates an insurable interest; and if, during the continuance of the risk, that insurable interest ceases to exist, the policy drops. There is authority which seems to uphold this view.<sup>3</sup> On the other hand, it may be said that the contract of insurance means that the insured is to be

<sup>1</sup> *Delaney v. Stoddart*, 1 T. R. 22 (1785); *Sparkes v. Marshall*, 2 Bing. N. C. 761 (1836); *Powles v. Innes*, 11 M. & W. 10 (1843); see L. R. 10 Q. B. 249. These cases are not decisions, but *dicta*; yet the *dicta* are so strong that they cannot be controverted.

<sup>2</sup> 2 American L. C. (5th ed.), 887, and cases cited.

<sup>3</sup> *North of England Oil Cake Co. v. Archangel Ins. Co.*, L. R. 10 Q. B. 249. See judgments of Lush and Quain, JJ., pp. 254, 255, also see p. 253; *Cockerill v. Cincinnati Ins. Co.*, 16 Ohio, 148.

indemnified from any loss which he may suffer during the period named in the policy. If he alienates the property insured, it is true that if the property is destroyed when he has no interest therein, it is not possible for him to hold the underwriter, for he has suffered no loss. But the contractual relation between the insurer and the insured still exists in spite of the sale of the property, and if, during the period named in the policy, he regains an interest in the property, and suffers a loss of that interest, there seems to be no reason why the insurers should not be held therefor. The insured has paid his premium to be protected for the period for which the policy is issued, and it would be a hardship to him not to have the benefit of that premium.

This view would satisfactorily account for the cases in which the insured alienates the interest originally insured, but retains an interest in the property insured; as, for instance, where he sells his land, at the same time retaining a mortgage to secure the purchase-money. This view has been adopted by both Mr. Phillips and Judge Hare, and is supported by authority.<sup>1</sup>

It is well settled that the policy does not pass as a mere accessory to the property.<sup>2</sup> The policy must be assigned, and this rule applies as well to marine insurance as to fire insurance. A mere delivery of the policy would seem to be a sufficient assignment;<sup>3</sup> but if there is no actual delivery, the assignor must agree to assign, or, what is much the same thing, agree to hold the policy for the benefit of the assignee. In the words of Baron Parke, the parties must keep the contract of insurance alive for the benefit of the assignee.<sup>4</sup>

In most policies of fire insurance at the present day, it is customary for the insurers to insert a number of clauses which provide that the policy shall be void in case the provisions of them are not complied with. Two very common clauses are the clauses against alienation of the property insured, and the assignment of the policy. It is settled that these clauses are conditions the non-

<sup>1</sup> 1 Phillips, Ins. 488; 2 Amer. L. C. (5th ed.) 893; Lane v. Maine, etc., Ins. Co., 12 Me. 44; Hooper v. Hudson River F. Ins. Co., 17 N.Y. 424; Wolfe v. Security F. Ins. Co., 39 N.Y. 49. See Shearman v. Niagara Fire Ins. Co., 46 N.Y. 526; Worthington v. Bearse, 12 Allen, 382.

<sup>2</sup> Lynch v. Dalzell; Powles v. Innes (*supra*); North of England Oil Cake Co. v. Archangel, Maritime Ins. Co. (*supra*); Lahiff v. Ashuelot Ins. Co., 60 N.H. 75.

<sup>3</sup> Sparkes v. Marshall, 2 Bing. N. C. 761.

<sup>4</sup> 11 M. & W. 13.

performance of which render the policy voidable by the insurers. As they are conditions, their performance may be waived; and, consequently, though in case of the assignment of a policy of insurance without the consent of the insurers or alienation of the property insured, the policy may be avoided, yet, if the insurer consents to the assignment, he waives the condition against assignment or alienation, and the alienee's rights under the policy are secure.<sup>1</sup>

*Chauncey G. Parker.*

HARVARD LAW SCHOOL.

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<sup>1</sup> *Oakes v. M'f'rs. Ins. Co.*, 135 Mass. 248.

# HARVARD LAW REVIEW

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THE present number completes the first volume of the HARVARD LAW REVIEW. In starting the magazine a year ago, the editors expressed the hope that the REVIEW might be of service, not only to those who were interested in the work of the School, but also to the profession at large. That this hope has been realized to some extent, the success of the present volume justifies us in saying. In the second volume the same general policy will be followed. Professor Langdell will complete his series of articles on "Equity Jurisdiction," Professor Ames will treat of the history and development of "Assumpsit," and Professor Keener will contribute an article on "Mistakes of Law." The list of contributors outside the School is indicated elsewhere.

THE March "Atlantic" contains an interesting article by Prof. James B. Thayer, defining the exact change effected in the status of the Indians by the Dawes Severalty Bill, which became a law on Feb. 8.<sup>1</sup> We give the following outline:—

The law does not abolish all the civil and political disabilities of the Indians; it deals with two subjects only, the ownership of land and citizenship.

The following are the chief provisions of the law as to the ownership of land:—

1. It authorizes (but does not require) the President to proceed at once to a survey of any Indian reservation containing good agricultural and grazing land, and to allot the land in specified amounts to such Indians as may apply for it in the designated way.

2. It authorizes the Secretary of the Interior, four years from the time that an allotment is ordered on any specific reservation, to compel each reluctant head of a family and single person among the Indians to take an allotment.

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<sup>1</sup> The Dawes Bill and the Indians. The Atlantic Monthly, vol. lxi. p. 315.

3. It provides that wandering Indians may settle upon any unappropriated public lands, and obtain an allotment without the usual payment of fees.

4. It provides that the Indian owner of land cannot, for twenty-five years, convey this land or make "any contract . . . touching the same."

5. It authorizes the Secretary of the Interior, on the completion of the allotments, or sooner, if the President thinks it "for the best interests" of the tribe, to purchase from the Indians any part of the reservations not needed for allotments, which shall be disposed of only to actual settlers, in tracts not exceeding one hundred and sixty acres to one person. The purchase-money paid by the Government is to be deposited on interest in the United States Treasury until appropriated by Congress for the education and civilization of the Indians of the reservation for whose land it is paid.

Section 6 of the Severalty law deals with the question of citizenship. Its chief provisions are as follows: (1.) It declares that every Indian who, before the law, has voluntarily left his tribe and adopted "the habits of civilized life" (and perhaps every Indian who may thereafter do this) shall be a citizen of the United States. (2.) It gives national citizenship, at once, to every Indian who shall have received an allotment of land under this law, or under any other law or treaty. (3.) It provides that when all the Indians on any reservation have thus been made citizens (and perhaps as each, in succession, becomes a citizen), they are to pass from under the special control of Congress, and "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

The following are pointed out as the chief omissions in the bill as to which further legislation is needed: (1.) The law does not include the case of ten or eleven excepted tribes, among which are the "civilized tribes" in the Indian Territory. (2.) It provides the reservations with no courts and no system of law to enforce the rights of the Indians and other citizens. (3.) It leaves the Indian land-owners with a much restricted right to the use of their land. (4.) It makes no provision for the construction of roads or other public improvements in the reservation. (5.) It provides for no system of education among the new citizens. (6.) It preserves untouched the non-intercourse reservation system, with unfettered political control. (7.) It offers no guarantee that the control of the United States over the Indians may not be taken away by artful wording of the acts for the admission of new States.

DR. ANDREW P. PEABODY, in his book of "Harvard Reminiscences"<sup>1</sup> makes the following interesting remarks concerning the origin and earlier professors of the Harvard Law School:—

"Chief Justice Parker, of the Supreme Court of Massachusetts, was Royall Professor of Law from 1816 to 1827. He was the first professor of law in the University. The Law School was established in 1817, at his suggestion. He never bore an active part in its administration, though it undoubtedly had the benefit of his advice and influence. The income of the Royall Professorship was barely sufficient to pay for a course of twelve or more lectures to each successive senior college class. Judge Parker's course comprised such facts and features of the common and

<sup>1</sup> Harvard Reminiscences. Andrew Preston Peabody, pp. 8, 57.



statute law as a well-educated man ought to know, together with an analysis and exposition of the Constitution of the United States. His lectures were clear, strong, and impressive; were listened to with great satisfaction, and were full of materials of practical interest and value."

Of Joseph Story he writes: "Dr. Dane, in establishing the professorship that bears his name, requested that Judge Story might be its first incumbent. In accordance with this wish and the concurrent desire of all the friends of the college, the appointment was made and accepted, in 1829. At the same time Mr. Ashmun was chosen Royall Professor of Law, with the understanding that he should have the immediate supervision of the Law School, while Judge Story was to devote to it such time as he could spare; and this was no little time, for he knew how to make his days elastic. There never was a man who did more work than he, and yet he knew not how to slight his work, or to put into it less of heart and soul than it could hold. With a body that seemed incapable of fatigue, he had the alertness and vivacity of youth, and imparted his own enthusiasm to his pupils.

"I had repeated opportunities of profiting by his instruction. In the moot courts, at which he presided in the Law School, he drafted juries among the divinity students, and I served several times in that capacity."

A NOVEL case, involving the question of larceny, was tried in the District Court at Providence, R.I., on Jan. 21. The defendant, a married woman, was charged with the larceny of a will from the deputy town-clerk. Her father had recently died, leaving \$5 to the defendant, and the rest of his property, estimated at \$60,000, to her brother. On the 9th inst. the will was presented to the Court of Probate, read and referred to the next meeting of the court with a notice of intended probate. The clerk of the Probate Court not being present at the meeting, the deputy town-clerk was elected clerk *pro tem.*, and retained the will in his possession. The next day the defendant entered the town-clerk's office and asked to see the will. The deputy town-clerk, knowing her to be the testator's daughter, gave it to her, whereupon she began to tear it into minute fragments in spite of his efforts to prevent her. When asked the motive of her act, she replied: "It was something that had to be done." She attempted to burn the fragments in the office stove, but being prevented, took them away, and burned them at her home.

The warrant on which she was arrested was based on ch. 242, sect. 11, of the Public Statutes of Rhode Island, which declares that "every person who shall steal any . . . assurance whatsoever, respecting any property, real or personal, shall be deemed guilty of larceny." The code gives no definition of the word "steal."

The court decided that the defendant was not guilty of larceny, "as the evidence showed that the woman had taken the will, not with intent to appropriate it to her own use, but with intent to destroy, and that she was in legal possession of it."

On Feb. 13 the destroyed will was regularly probated. The contents of the will had been read and noted by the court and clerk at the first meeting; the lawyer who drew up the will swore to its contents; and the son, who was the principal beneficiary, produced a carefully preserved copy, which he had retained in his possession.

## THE LAW SCHOOL.

SUPREME COURT OF POW-WOW.

*Life Insurance — Insurable Interest.*

The case was submitted on the following facts: One Brown agreed to enter the plaintiff's employ and to serve him for the period of five years; whereupon the plaintiff insured Brown's life with the defendants for his own benefit. Brown died before the date fixed for entering plaintiff's employ, — and the defendants refuse to pay the policy on the ground that the plaintiff had no insurable interest.

Contracts of Marine or Fire Insurance, and contracts of Life Insurance, differ essentially in their nature. The former are strictly contracts of indemnity, and an insurable interest is necessary to prevent such contracts being made the means of speculation and profit. But contracts of life insurance are not contracts of indemnity. They are speculative contracts, whereby, in consideration of the payment of an annual premium, the insurers agree to pay a lump sum upon the death of the insured.<sup>1</sup> There is no reason why these contracts should not be enforced in all cases, — no matter what may be the relation between the insured and the assured. Yet the death of the insured is the contingency upon which the insurance money is payable, and the law must provide that these contracts do not prove an incentive to crime. This consideration of public policy is complied with if the assured at the time of taking out the policy has a reasonable expectation of pecuniary benefit or advantage from the continued life of the insured, and this is what is called an insurable interest.<sup>2</sup> No circumstance of loss need be taken into account, for it would be absurd to talk of one's loss in his own life, and the idea of loss in the law of life insurance is due to a misconception of the likeness between life and indemnity policies.

Has the plaintiff an insurable interest in the present case? We think that he has. He held a valid contractual relation to the insured which the law recognizes, and from which he had reason to expect a benefit. The fact that the contract relation was voidable by the insured does not alter the matter. The Statute of Frauds is an affirmative defence and personal to the insured. The defendants in this case cannot avail themselves of that defence, to rid themselves of their obligation to the assured.

## LECTURE NOTES.

THE STRICT LEGAL SIGNIFICANCE OF THE TERM "EQUITABLE ESTATE." — (*From Prof. Ames' Lectures.*) — It is a misnomer to say that a *cestui que trust* has an equitable *estate* in land. What is meant by an equitable estate is, strictly speaking, not an *estate* (*i.e.*, any ownership in the *res* itself) at all, — it is a right *in personam* as distinguished from the right *in rem* possessed by the owner of a true estate. What is called a conveyance of an equitable estate is really only the assignment of a *chose in action*. Such conveyances are made without

<sup>1</sup> *Dalby v. India Ass. Co.*, 15 C. B. 365.

<sup>2</sup> *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U.S. 457, 460.

deeds, and require writing only to satisfy the Statute of Frauds. The legal estate and the so-called equitable estate cannot be held by the same person,—no man can hold property in trust for himself. When the *cestui que trust* gives up his interest to the trustee, there is no merger of estates. The trustee acquires nothing that he did not have before, but the *cestui's* right of action is extinguished, for no man can have a right of action against himself. The trustee's estate is not enlarged; it is only his liability that has changed. He holds the legal estate as he held it before; but the "equitable estate" is extinct.

This becomes important in cases like *In re Van Hagan*.<sup>1</sup> Here the testator gave to his mother a general power of appointment over certain real estate, and provided that if this power should not be exercised the estate should go to C. The mother, by her will, gave the property in question to certain trustees in trust for one G, who died during the testator's lifetime. The court held that the trustees should hold in trust for the heir-at-law of the mother. The testator had parted with his whole interest, leaving nothing which his heir could take; the power of appointment had been exercised, shutting out C; there was never any intent that the trustees should take for their own benefit; and the mother, having exercised her power, was in the position of an owner who had conveyed upon a trust which could not be fulfilled, and there was therefore a resulting trust in her favor.

Now, if the interest granted by the mother to G had been an *estate*, properly so called, the appointment as to that estate would have failed, and the estate would have passed to C. If she had appointed to G directly, G dying before the testator and no other appointment having been made, C would have taken the estate. So, if she had given the estate to another for years with remainder to G, G dying before the testator, it would seem that no appointment as to the remainder had been made, and this remainder would, by the testator's will, have gone to C. But as the interest given to G was not an estate, but an interest only, the whole estate being vested in the trustees, there was no failure of appointment, and C was barred.

The distinction between an estate, properly so called, and an equitable interest is overlooked in Massachusetts when property is devised by a will that discloses a trust, but keeps the object of the trust a secret between the testator and the trustee. Such property goes, in Massachusetts, by way of resulting trust, to the heirs or next of kin of the testator, as property not disposed of by the will, the secret trust being set aside as too indefinite.<sup>2</sup> This theory seems unsound. The testator cannot, as has already been said, hold both the legal estate and the equitable estate, so called—his entire interest was the right *in rem* which he devised to the trustee, and, consequently, nothing remains that the heirs or next of kin can take as property not disposed of by the will. The testator, it is true, created a right *in personam* against the trustee of which the heirs or next of kin may, in certain contingencies, obtain the benefit; but this right was not property of the testator.

LIABILITY OF AN INFANT FOR DECEIT IN INDUCING A SALE. —  
(*From Prof. Gray's Lectures.*) — Cases of some difficulty in regard

<sup>1</sup> Weekly Notes (1880) 164 (Ames' Cas. on Trusts, 239).

<sup>2</sup> Gray, J., in *Oliffe v. Wills*, 130 Mass. 221. But see *Riordan v. Bannon*, Irish Rep. 10 Eq. 469 (Ames' Cas. on Trusts, 308); *Crook v. Brooking*, 2 Vern. 50, 106; *Smith v. Attersoll*, 1 Russ. 266; *In re Fleetwood*, 15 Ch. D. 594; *Scott v. Brownrigg*, L. R. 9 Irish, 246 (*Semble*); *Saylor v. Plaine*, 31 Md. 158, 167 (*Semble*), *contra*.

to the liability of infants for tort are those arising out of sales. Two cases may be put to illustrate the point.

1. An infant agrees to deliver ten casks of wine, and receives the price for them in advance. He delivers ten casks containing a mixture of water and wine.

2. An infant having ten casks filled with a mixture of water and wine and knowing their contents, sells them as containing pure wine.

In the first case the infant is clearly not liable. He has simply broken a contract to deliver the wine. He might have availed himself of his infant's privilege by refusing to deliver anything, and incurred no liability for the breach of contract, though if he retained *in specie* the price paid, it might, of course, be recovered. *A fortiori* there is no liability if, instead of wholly repudiating the contract, the infant delivered goods of inferior quality. There is no tort, but simply a breach of contract.

But in the second case, instead of breaking a contract, the infant has induced by fraud the formation of one, and it might well be held that he should be liable. There is a reason why the infant should be protected from his promises, but there is no reason why he should be protected from his lies.

This distinction, however, is not taken. On both sides of the water it is held that an infant is not liable for a warranty known to be false. *Green v. Greenbank*, 2 Marsh. 485; *Gilson v. Spear*, 38 Vt. 311.

Although this is well settled, it is hard to reconcile with cases which have held an infant liable for purchasing goods on credit, intending at the time of the sale not to pay for them. *Wallace v. Morss*, 5 Hill, 391; *Mathews v. Cowan*, 59 Ill. 341. The gist of the liability seems to be that the infant fraudulently induced the plaintiff to make a sale or a contract, but this is equally true in the case of a warranty known to be false.

Consider also, in this connection, the liability of an infant for representing himself to be of age and thereby inducing a sale. In *Johnson v. Pie*, 1 Lev. 169, it was held that the infant was not liable, but in *Fitts v. Hall*, 9 N.H. 441, it was held that he was liable for misrepresenting his age. Now, assuming that an infant is not liable for a false warranty or false representations as to goods, it is difficult to see why he should be liable for a false statement in regard to himself. Consistency would require that infancy be held a good defence. In equity the question is treated in a curious way. It is said that the infant is estopped to say that he was not of age. In *Ex parte Unity Joint-Stock Banking Association*, 3 DeG. & J. 63, it was held that contracts made by means of false representations of his age could be proved against an infant's estate. It is certainly undesirable and unjustifiable upon principle that the rule should be different in equity and at law.

## RECENT CASES.

**AGENCY — AUTHORITY OF TOWN TREASURER.** — The plaintiff loaned money to the defendant town, and took certain notes from its treasurer, which he had authority to give. A statute was then passed taking from towns the power to borrow money except for certain purposes, which do not cover this case. The treasurer then gave the plaintiff a new note for the amount of the old ones. *Held*, the plaintiff cannot recover, since the new note was a new contract which the town at that time had no right to make; and, further, the treasurer had no authority to renew a note which he had given with full authority. *Abbott v. North Andover*, 14 N. E. Rep. 754 (Mass.).

**ASSIGNMENT OF UNEARNED SALARIES.** — A Territorial commissioner of immigration assigned a quarter's salary before it was due. *Held*, that the assignment was void as being contrary to public policy. *King v. Hawkins*, 16 Pac. Rep. 434 (Ariz.).

**BILL OF EXCHANGE — BONA FIDE PURCHASER.** — The plaintiff drew a sight bill on a party in Wheeling, W. Va., where the defendant bank is located. It was drawn to the order of the Penn Bank. The Penn Bank indorsed it to the defendant bank, with which it kept a reciprocal account of funds arising from collections. The defendant collected the money and put it to the credit of the Penn Bank, after which there was still due from the Penn Bank to the defendant a considerable sum. The Penn Bank failed, and plaintiff sues the defendant in assumpsit on the ground that the bill was left with the Penn Bank simply for collection. *Held*, he cannot recover. He should have written "For collection" upon the bill in order that defendant should have notice that it was not the bill of the Penn Bank, but of the plaintiff. *Carroll v. Exchange Bank*, 4 S. E. Rep. 440 (W. Va.).

**CARRIERS — LIABILITY FOR PERSONAL BAGGAGE ONLY.** — The plaintiff bought a ticket of the defendant, and had his valise checked by the baggage-master. The valise contained merchandise and no personal baggage. *Held*, he cannot recover for the loss of the valise. *Blumenthal v. Maine Cent. R. Co.*, 11 Atl. Rep. 605 (Me.).

**CONSTITUTIONAL LAW — ACT IMPAIRING THE OBLIGATION OF CONTRACTS.** — The act of the legislature of the State of Iowa, which exempts the homestead of a pensioner purchased with pension money from execution upon a debt due before the purchase, is unconstitutional as impairing the obligation of contracts. Two judges dissent. *Foster v. Byrne*, 35 N. W. Rep. 513 (Iowa).

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE.** — Writ of *habeas corpus* by an engineer upon a railroad extending through several States, imprisoned for violation of statutes requiring locomotive engineers in that State to be examined and licensed by a board appointed by the Governor for that purpose. A moderate license fee was exacted. *Held*, the statute was not unconstitutional on the ground of interfering with interstate commerce, in the absence of congressional legislation upon the subject. The statute was treated as a part of the State law of carriers, affecting commerce only indirectly and remotely. Bradley, J., dissented. *Smith v. State of Alabama*, U. S. Supreme Court, Jan. 30, 1888, 16 Wash. L. Rep. 101; s. c. 37 Alb. L. J. 172.

**CONSTITUTIONAL LAW — POLICE POWER — MEDICAL PRACTICE ACT.** — The certificate of a physician cannot be revoked by a State board under a statute authorizing revocation for unprofessional or dishonorable conduct, because he has advertised. The statute which gives the board such arbitrary power is unconstitutional for a great variety of reasons. *People v. McCoy*, 37 Alb. L. J. 113; 20 Chi. Leg. News, 151 (Cook county, Ill.).

**CONTRACT — TENDER OF PERFORMANCE UNNECESSARY.** — The defendants, before the time for performance, notified the plaintiffs that they would not receive the property contracted for. *Held*, the plaintiffs may sue at once, and the defendants cannot retract their renunciation of the contract. *Windmuller v. Pope*, 14 N. E. Rep. 436 (N. Y.).

**CURTESY.** — The husband is not entitled to curtesy in lands bought with property settled by him upon the wife. *Dugger's Children v. Dugger*, 4 S. E. Rep. 171 (Va.). *Contra*, *Soltan v. Soltan*, 6 S. W. Rep. 95 (Mo.).

DEED TO WIFE DELIVERED IN ESCROW. — A husband made a deed to his wife, and delivered it to a third person to be handed to the grantee on the death of the grantor. The husband subsequently recovered the deed from the holder, and destroyed it. *Held*, that the title passed to the wife on the delivery of the deed, subject to a life interest in the husband, and that the destruction of the deed was of no effect. *Albright v. Albright*, 36 N. W. Rep. 254.

The case follows 60 Wis. 377, which holds that a freehold may be granted to begin *in futuro*.

EQUITY JURISDICTION — SPECIFIC PERFORMANCE OF NEGATIVE AGREEMENT. — The defendant, the Associated Press, agreed to furnish the plaintiff with news by means of the defendant telegraph company, and to furnish news to no other paper in the plaintiff's town. The bill asked an injunction to restrain the defendant from furnishing news to the other papers. The case was decided on the grounds of indefiniteness of the contract and want of jurisdiction; but the court discuss the cases of *Kemble v. Kean*, 6 Sim. 333, and *Lumley v. Wagner*, 1 DeG., M. & G. 604, and seem to prefer the latter, though they admit that the former represents the weight of American authority. A note collects cases. *Iron Age Pub. Co. v. W. U. Tel. Co.*, 26 Cent. L. J. 125 (Ala.).

EVIDENCE — AMBIGUITY IN WILL. — A bequest was left to "my step-son, H. S. Covert." There was no such person; but the testatrix had a step-son, John Harvey Covert, who claimed under the will. The court, against the objection of the defendants, who were the brothers and sisters of the testatrix, permitted the scrivener who drew the will to testify that the testatrix directed him to prepare a will giving the property to her "step-son Harvey;" that he thought that Harvey's initials were "H. S.," and wrote them to designate him. *Covert v. Sebern*, 35 N. W. Rep. 636 (Iowa).

It seems, however, that the evidence should not have been admitted. The evidence merely amounts to a declaration by the testatrix that she intended to leave the property to Harvey. "The only case in which evidence of that kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or two things." L. R. 7 H. L. 364, 377. The court failed to distinguish between direct evidence of the testatrix's intention and other extrinsic evidence tending to explain the ambiguity. See *Bulton v. American Tract Soc.*, 23 Vt. 236; *Bernasconi v. Atkinson*, 10 Hare, 348; *Drake v. Drake*, 8 H. L. C. 172; *Charter v. Charter*, L. R. 7 H. L. 364.

EXECUTOR DE SON TORT. — The defendant took fifty cows of a deceased person's estate under a bill of sale which was not sufficiently definite to pass the title. *Held*, that he may be charged as executor in his own wrong. His debt must be postponed in behalf of the other creditors. *Baumgartner v. Haas*, 11 Atl. Rep. 588 (Md.).

FOUND PROPERTY — RIGHT TO POSSESSION. — Defendant found a walnut log entangled in a drift, and set it afloat. On account of the breaking of defendant's boom, the log drifted upon plaintiff's land. Defendant removed the log after identifying it. Replevin is brought against him. *Held*, the defendant is entitled against all persons except the original owner. The plaintiff's riparian rights cannot help him. *Deaderick v. Oulds*, 5 S. W. Rep. 487 (Tenn.).

GARNISHMENT — BONA FIDE PURCHASER. — The defendant was a purchaser for value without notice of a chattel from a garnishee. The plaintiff seeks to charge him for the conversion of it because of the garnishment in his favor. A demurrer was sustained, on the ground that the garnishment was not a lien upon the chattel. *McGarry v. Lewis Coal Co.*, 6 S. W. Rep. 81 (Mo.).

INSURANCE, FIRE — RIGHT OF INSURER WHEN INSURED RECOVERS FROM THE ONE WHO CAUSED THE FIRE. — An insurance company paid a loss caused by a gas explosion. The insured then recovered from the gas company. The insurers brought an action against him for money had and received to recover what they had paid on the policy. Allowed. *Law Assurance Co. v. Oakley*, 84 L. T. 280 (Q. B. D.).

LIBEL — PUBLICATION. — A servant on entering the services of a husband and wife handed to the latter a written character from a previous employer. He was dismissed. The husband indorsed on the character the reason for dismissal, and returned it to his wife, who gave it back to the servant. The servant brought an action for libel based on the alleged cause for dismissal, and it was held that there was no evidence of publication, since husband and wife are one person. *Wennhak v. Morgan*, 23 Law Jour. Notes of Cases, 31 (Q. B. D.).

**MARRIAGE—WHAT CONSTITUTES.**—Under the provision of the California code that consent alone will not constitute marriage, but must be followed by a solemnization, "or by a mutual assumption of marital rights, duties, or obligations," it is not necessary to the validity of the marriage that the relation of the parties be made public, and proof of cohabitation is sufficient to show a mutual assumption of marital rights and duties. Two judges dissent. *Sharon v. Sharon*, 16 Pac. Rep. 345 (Cal.).

The case contains an elaborate inquiry as to what is essential to a lawful marriage. See, also, *Beverlin v. Beverlin*, 27 Am. L. Reg. 94 (W. Va.), with a note giving the law of the different jurisdictions in this country in detail.

**NEGLIGENCE—BURDEN OF PROOF.**—While in the defendant's depot, in passing through a swinging door, in which was a pane of glass, the plaintiff was cut by reason of the breaking of the glass when he put out his hand to receive the force of the door as it swung from the hand of a person preceding him. The plaintiff contended that this was a *prima facie* case of negligence, because the defendant was a carrier. *Held*, that the rule shifting the burden of proof applied only where the injury was caused by the machinery of transportation or in the course of business peculiar to a railroad company. *Hayman v. Pa. R. Co.*, 11 Atl. Rep. 815 (Pa.); *Morris v. Railroad Co.*, 13 N. E. Rep. 455 (N. Y.), accord.

**NEGLIGENCE—FIRE.**—Defendant was burning cornstalks in his own field. The fire, by reason of a change in the wind, got beyond his control and threatened haystacks in a neighbor's meadow. He attempted to save the stacks by setting a back-fire in the meadow, but this fire escaped and burned the stacks. *Held*, that there was no liability unless the defendant was negligent, and that no extraordinary care was required; and further, that there was no error in an instruction to the effect that negligence in the management of the back-fire would not render him liable if the first fire escaped without his fault, and would surely have destroyed the stacks. *Sweeney v. Merrill*, 16 Pac. Rep. 454 (Kan.).

**PARTNERSHIP.**—The defendant A, having an empty storehouse, told the defendant B that he would give him the use of the house and \$200 for carrying on his business, in return for one-half the profits of such business. B carried on the business in his own name, and both A and B agree in their testimony "that A was to have one-half the profits for the use of the house and the money." *Held*, that A was a partner as to third persons, and liable for debts contracted by B in the course of the business. *Marbut v. Moore*, 4 S. E. Rep. 383 (Ga.).

**PARTNERSHIP—DISSOLUTION.**—One partner, without the knowledge of his copartner, sold most of the firm property, took the rest with him, and went into business in his own name in another State. As soon as his whereabouts was discovered, the defrauded partner sought him out, and induced him to give a promissory note for a *bona fide* debt. He afterward attached the stock, part of which had been purchased by the absconding partner on his sole credit. *Held*, that the attachment gave a priority over those who had thus furnished goods, since the defrauded partner was justified in treating the partnership as dissolved, and was, therefore, like any other creditor. *Strong v. Stapp*, 15 Pac. Rep. 835 (Cal.).

**POWER OF APPOINTMENT—EFFECT OF.**—It was agreed by a marriage settlement that if either husband or wife should thereafter become entitled to realty or personalty to the value of £500 at one time, and from the same source, it should be settled like the other property. The wife's father bequeathed £4,000 to trustees for such person as she should appoint, and in default of appointment for her separate use, declaring his intention to enable her to defeat the covenant in the marriage settlement. She appointed the whole to herself by successive appointments, each less than £500. *Held*, that it was not bound by the covenant. *Re Lord Gerard*, 84 L. T. 278 (Ch. D.).

**RULE AGAINST PERPETUITIES—CHARITABLE TRUST.**—Money was devised in trust to pay the income to the incumbent of a certain church and his successors so long as no demand was made for pew-rent; then it was to fall into the residue and be treated as a part of the residuary personal estate. *Held*, that the gift over was not void under the rule against perpetuities, since it was merely a direction that it should go as the law would have made it go. *Re Randell*, 84 L. T. 279 (Ch. D.).

**SALE, CONDITIONAL—BONA-FIDE PURCHASER WITHOUT NOTICE.**—The plaintiff sold goods to a purchaser, with a stipulation that the title should not pass until the price was all paid. The purchaser mortgaged the goods to the defendants, who had no notice of the agreement. *Held*, the defendants are pro-

tested. The court recognize that the law is settled otherwise in many of the States. *Lincoln v. Quynn*, 11 Atl. Rep. 843; 18 Md. L. J. 117 (Md.).

**SALE—GOODS ORDERED TO BE MANUFACTURED—DAMAGES.**—Defendant ordered lumber of plaintiff to be manufactured in specified sizes for a particular purpose, and to be delivered at a distance. The defendant was to inspect the manufactured lumber before it left the mill. After the lumber had been prepared by the plaintiff according to the contract, the defendant absolutely refused to inspect, receive, or pay for the same. The value of the lumber depended almost wholly on the work and skill of the plaintiff. *Held*, in an action on the contract, that the measure of damages should be the contract price, less the cost of delivery. "The vendor will, of course, in such case hold the property for the vendee." *Black River Lumber Co. v. Warner*, 6 S. W. Rep. 210 (Mo.).

The theory of this case is obscure. The court practically enforces specific performance of a contract which would not be enforced in equity. The title to the manufactured goods is said to pass to the vendee, who is required to pay the full contract price. It is not disclosed when the title passes, but it would seem that, if the doctrine of the court is accepted, the title should pass, as in trover, when judgment is obtained and damages are paid. In New York, however, the title is held to pass upon tender of the goods by the seller, if he chooses that it shall then pass. *Mason v. Decker*, 72 N. Y. 595; *Des Arts v. Leggett*, 16 N. Y. 582. The true rule appears to be that the title, in such cases as this, remains in the vendor until appropriation with the consent of both parties; and that the vendor may recover for the defendant's breach of contract the difference between the market price and the contract price, unless the vendee is fixed by the contract with the risk, when a different rule might prevail.

The court apparently limit their rule to cases where the goods have been manufactured especially for the vendee; but in some States there is no such limitation. In New York the vendor not only has the usual remedy on the contract, but may, after a tender to the vendee, either sell as his agent, and then recover the balance due on the contract, or sue at once for the whole contract price. See *Whitney v. Boardman*, 118 Mass. 242, 248, where it is laid down that the plaintiff may recover the expenses of a sale at auction if he notifies the defendant of intention to sell,—that is, he recovers the difference between the contract price and the *net* proceeds of the sale.

**STATUTE OF LIMITATIONS—ACKNOWLEDGMENT BY BANKRUPT.**—The defendant was the assignee of one S. As such he rejected a claim of the plaintiff filed against the estate, founded upon a promissory note which was barred by the Statute of Limitations. After the filing of the claim, S gave the plaintiff a written promise to pay it. The Iowa statute provides that the cause of action is "revived by a new promise to pay the same." *Held*, the plaintiff may recover. *Hellman v. Kiene*, 35 N. W. Rep. 516 (Iowa). Compare *Appeal of Kauffman*, 9 Central Rep. 737 (Pa.).

**SUBROGATION—VOLUNTARY PAYMENT OF ANOTHER'S DEBT.**—A child died and was buried by an undertaker. Her uncle voluntarily paid the charges of the undertaker without taking an assignment of the claim, or anything to show that it was not intended as an absolute discharge. He now asks to be subrogated to the undertaker's rights against the estate of the deceased. *Held*, that a volunteer can never claim the benefit of the law of subrogation. *Fay v. Fay*, 11 Atl. Rep. 122 (N. J.).

**TRUSTS—CHARGING TRUST ESTATE.**—The plaintiff was engaged as an attorney by the predecessor of the defendant trustees upon legal business connected with the trust estate. His fee not having been paid, he seeks to charge the estate in the defendants' hands. The petition is bad on demurrer. The plaintiff has but a personal claim upon the trustees, the defendants' predecessor; but if he could show that he was insolvent and that the estate had received the fruits of the plaintiff's labor, and that the assets in the defendants' hands were enhanced to that extent, a court of equity might assist him. *Kittredge v. Miller*, 19 Weekly Law Bulletin, 119 (Sup'r Ct. Cincinnati).

**WILL, NUNCUPATIVE—WITNESS IGNORANT OF LANGUAGE.**—Under a statute requiring a nuncupative will to be executed in the presence of three witnesses, The will was written down in French at the time it was made. As the testator uttered each part in French, it was translated to one witness, who could not understand the language. It did not appear that the testator could understand English. *Held*, the will was invalid. The witness might as well have been deaf. *Succession of D'Auterive*, 3 So. Rep. 341 (La.).







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